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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961

Number [redacted] 114

STATE OF GEORGIA and the PUBLIC SERVICE COMMISSION OF THE STATE OF GEORGIA,
Appellants,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

JURISDICTIONAL STATEMENT.

EUGENE COOK,
The Attorney General,
PAUL RODGERS,
Assistant Attorney General,
Counsel for the Appellants.

P. O. Address:
132 Judicial Building,
40 Capitol Square,
Atlanta 3, Georgia.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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79 Cong. Rec. 5658, r. col. (1935) 25, 26
79 Cong. Rec. 5667, r. col. (1935) 27
79 Cong. Rec. 5735-5787, r. col. (1935) 27, 28
79 Cong. Rec. 12196, r. col. (1935) 29
79 Cong. Rec. 12197, l. col. (1935) 29
79 Cong. Rec. 12204, r. col. (1935) 29
70 Cong. Rec. 12209, l. col. 12210, l. col. 12213, r. col. (1935) 30
79 Cong. Rec. 12210, r. col. (1935) 29
79 Cong. Rec. 12214, r. col. (1935) 29
79 Cong. Rec. 12215, r. col. (1935) 30
79 Cong. Rec. 12233, r. col. (1935) 30

79 Cong. Rec. 12279, r. col. (1935) 30
79 Cong. Rec. 12279, l. col. (1935) 31
79 Cong. Rec. 12459, r. col. 12460, l. col. (1935) 31
79 Cong. Rec. 12863, l. col. (1935) 31
28 Harvard Law Review 34, p. 69, 2d par. 47
House Rep. No. 1645, p. 3, 5th par., 74th Cong., 1st Sess. (1935) 30
Senate Rep. No. 482, p. 3, 3d par., 74th Cong., 1st Sess. (1935) 25

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

Number .....

STATE OF GEORGIA and the PUBLIC SERVICE COMMISSION OF THE STATE OF GEORGIA,
Appellants,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

JURISDICTIONAL STATEMENT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Appellants submit herewith their Jurisdictional Statement as required by Rules 13 and 15 of the Revised Rules of the Supreme Court of the United States.

I.

OPINION BELOW.

The opinion and final judgment of the Three-Judge District Court[1] is reported at 201 F. Supp. 813-815, and is reprinted in Appendix A, infra, p. 54.

II.

JURISDICTION.

This is a suit brought by the State of Georgia and the Public Service Commission of the State of Georgia in the United States District Court for the Northern District of Georgia, Atlanta Division, against the United States of America and the Interstate Commerce Commission, seeking to enjoin, annul and set aside an Order of the Interstate Commerce Commission. Jurisdiction of the suit is vested in the Three-Judge District Court by 28 U. S. C., Sections 1336 and 2325.

On December 19, 1961, the Three-Judge District Court entered final judgment denying the relief sought by Georgia, and on February 12, 1962,[2] the notice of appeal to this Court from such judgment was filed with the Clerk of the District Court. On March 26, 1962, counsel for the Appellants presented a motion for enlargement of time for docketing the case on appeal to this Court, to a member of the Three-Judge District Court who granted such motion by enlarging such time to and including May 14, 1962.[3]

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[1] Record, pp. 148-151.

[2] Record, pp. 152-153.

[3] Record, pp. 154-155.

The jurisdiction of this Court to review by direct appeal such final judgment is conferred by 28 U. S. C., Sections 1253 and 2101(b).

The following cases sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *United States v. Baltimore and Ohio Railroad Co.* (1948), 333 U. S. 169, 92 L. ed. 618, 68 S. Ct. 494; *United States v. Hancock Truck Lines, Inc.* (1945), 324 U. S. 774, 89 L. ed. 1357, 65 S. Ct. 1003; *Interstate Commerce Commission v. City of Jersey City* (1944), 322 U. S. 503, 88 L. ed. 1420, 64 S. Ct. 1129; *Interstate Commerce Commission v. Hoboken Manufacturers' Railroad Co.* (1943), 320 U. S. 368, 88 L. ed. 107, 64 S. Ct. 159, reh. den. 321 U. S. 801, 88 L. ed. 1088, 64 S. Ct. 516; *Union Pacific Railroad Co. v. United States* (1941), 313 U. S. 450, 85 L. ed. 1453, 61 S. Ct. 1064, reh. den. 314 U. S. 707, 86 L. ed. 565, 62 S. Ct. 51; and *United States v. Idaho* (1936), 298 U. S. 105, 80 L. ed. 1070, 56 S. Ct. 690.

III.

QUESTIONS PRESENTED.

Whether or not the Interstate Commerce Commission has been delegated the authority by Part II of the Interstate Commerce Act (49 U. S. C., Sections 301 to 327, inclusive), to issue and enforce its Order, dated September 22, 1961, in cause number MC-C-3358, adopting regulations, denominated as 49 C. F. R., Part 180a, requiring that no motor common carrier of passengers subject to Section 216 of the Interstate Commerce Act shall operate a motor vehicle in interstate or foreign commerce on which the seating of passengers is based upon race, color, creed or national origin, and further requiring that such motor common carrier in the operation of vehicles in

interstate or foreign commerce shall not utilize any terminal facilities providing any separation on the basis of race, color, creed or national origin.

This question subdivides into the following:

Whether or not the Order of the Interstate Commerce Commission involves the direct regulation of passengers traveling in intrastate commerce on vehicles subject to the Order and to such passengers and local patrons, not involved in commerce, utilizing terminal facilities subject to the Order.

Whether or not the Interstate Commerce Commission is authorized by Part II of the Interstate Commerce Act to regulate directly such intrastate passengers and such local patrons having a nexus with an instrumentality subject to the ICC Order.

IV.

STATEMENT.

This is an appeal from the final judgment of a Three-Judge District Court for the Northern District of Georgia, Atlanta Division, denying the interlocutory and permanent injunctions and other relief sought by the Appellants in an action they had instituted to enjoin, annul and set aside an Order of the Interstate Commerce Commission, dated September 22, 1961, in cause number MC-C-3358, adopting regulations, denominated as 49 C. F. R., Part 180a, requiring that no motor common carrier of passengers subject to Section 216 of the Interstate Commerce Act shall operate a motor vehicle in interstate or foreign commerce on which the seating of passengers is based upon race, color, creed or national origin, and further requiring that such motor common carrier in the operation of vehicles in interstate

or foreign commerce shall not utilize any terminal facilities providing any separation on the basis of race, color, creed or national origin. The ICC Order is reprinted in Appendix B, infra, p. 59. It originated out of the following circumstances:

On May 29, 1961, the Attorney General of the United States filed a petition with the Interstate Commerce Commission proposing seven regulations for adoption by the Commission designed to prohibit discrimination on the basis of race, color, creed or national origin in seating on motor carriers and in terminal facilities involved in interstate commerce. The proposed regulations provided for public notice of the nondiscriminatory provisions and for notice to the Commission of interference with observance of the regulations.[4]

In accordance with the Attorney General's petition, the Interstate Commerce Commission, by notice and order entered June 19, 1961, instituted MC-C-3358, entitled "Discrimination in Operations of Interstate Motor Carriers of Passengers," under Part II of the Interstate Commerce Act and specifically under Sections 204 (a) (6), 204 (c), 216 and 220 of such Part II and under Section 4 of the Administrative Procedure Act.[5] The June 19 Order scheduled a hearing before the ICC on August 15, 1961. At the hearing the following persons appeared and argued orally: A representative of the United States Department of Justice; a member of Congress for the State of New York; a representative of the National Association for the Advancement of Colored People; a representative of the Congress of Racial Equality; a representative of the Southern Christian Leadership Conference; a representative of the Free-

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[4] Record, p. 1, par. 4, p. 38, par. I, p. 33.

[5] Record, p. 2, par. 5, p. 38, par. I, p. 33.

dom Ride Coordinating Committee; three representatives of the Student Nonviolent Coordinating Committee; a representative of the National Association of Motorbus Owners; and a representative of the Public Service Coordinated Transport.[6]

The representative of the National Association of Motorbus Owners argued against the adoption of the proposed ICC Order in the following terms:[7]

> The difficulty we have with the regulation proposed by the Attorney General arises from the fact that while in its proposed form it is applicable to interstate carriers, it is phrased in such terms that it would apply to both interstate and intrastate transportation services. Indeed, this intent is voiced by the Attorney General in his statement in support of the regulation.
>
> In so far as it would apply to interstate transportation and prohibit separation of the races, it simply restates existing law and we feel that it is therefore unnecessary. In so far as it would extend jurisdiction of this Commission to intrastate transportation, it would be in excess of the statutory and constitutional authority of the Commission.
>
> With regard to intrastate transportation, the proposed regulation would cause the Commission to assume enforcement of antidiscrimination laws and regulations which are by law left to the United States judiciary and the Attorney General's office for enforcement.
>
> It should be borne in mind that this Commission is charged with responsibility for furthering and fostering a sound transportation system in the United States.

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[6] Respondents' Exhibit No. 1, p. 1; Record, p. 44, 1 par.

[7] Respondents' Exhibit No. 1, p. 90, 3d par.; Record, p. 44, 1 par.

This obligation includes the prevention of discrimination in interstate transportation.

However, it is not the province of the Interstate Commerce Commission to enforce laws not committed to it by Congress or to extend its statutory authority to non-interstate operations.

This proceeding before the ICC culminated in the issuance of its Order of September 22, 1961, which became effective November 1, 1961.[8]

The Appellants filed their complaint in the District Court on October 31, 1961.[9] The complaint requested, inter alia, the issuance of a temporary restraining order suspending the operation of the ICC Order pending the convening of the Three-Judge District Court.[10] The District Judge to whom the complaint was presented denied the restraining order.

An analysis of the negotiation of commerce in the perspective of this case, initially divides into a consideration of the instrumentalities and subjects of commerce. Instrumentalities include the inanimate objects, such as the buses and terminals, and the human agencies, such as the drivers and mechanics who operate and maintain the buses. The subjects of commerce include the persons and goods transported by the buses. Superimposed upon these divisions is the legal dichotomy of inter- and intrastate commerce depending upon the utilization of the instrumentality and the journey of the subject.

The Federal Motor Carrier Act of 1935, denominated as Part II of the Interstate Commerce Act, delegates to the

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[8] Record, p. 2, pars. 5, 6, p. 38, par. I.

[9] Record, p. 1.

[10] Record, p. 7, subpar. (b).

ICC the authority to regulate the instrumentalities and subjects of interstate commerce,[11] but expressly denies to the ICC the authority to directly regulate the instrumentalities and subjects of intrastate commerce.[12]

The reach of the Federal Motor Carrier Act as applied to interstate instrumentalities is very broad. The Act not only applies to vehicles traversing State boundaries, but also to vehicles acting as connecting carriers in interstate commerce.[13] Obviously, intrastate passengers comprise a substantial component of those transported by vehicles subject to the Act.

The Appellants contended: That the enforcement of the ICC Order attempts to directly regulate passengers traveling in intrastate commerce on vehicles subject to the Order and to such passengers and local patrons, not involved in commerce, utilizing terminal facilities subject to the Order; that the Act does not authorize the ICC to directly regulate such intrastate passengers and local patrons; that the commingling of inter- and intrastate passengers and such local patrons within interstate instrumentalities does not emasculate the identity of such intrastate passengers and local patrons for regulatory purposes; and that, hence, the Order is null and void because its enforcement transcends the authority delegated to the ICC by the Act.

The Appellees contended: That the ICC Order merely regulated interstate instrumentalities and that any consequent effect upon such intrastate passengers and local

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[11] 49 U. S. C., Sec. 302 (a).

[12] 49 U. S. C., Secs. 302 (b) and 316 (e) (proviso).

[13] *United States v. Capitol Transit Co.* (1949), 338 U. S. 268, 94 L. ed. 93, 70 S. Ct. 115; *Parmelee Transportation Co. v. Keeshin* (DC-ND Ill.—1956), 144 F. Supp. 480, 483 (1); *Humble Oil & Refining Co. v. Texas & Pacific Ry. Co.* (Tex. Civ. App.—1955), 275 S. W. 2d 824, 829 (6).

patrons was incidental and indirect; and that, hence, the Order is valid because its enforcement is within the authority delegated to the ICC by the Act. In support of this contention, the Appellees relied upon: *Southern Railway Co. v. United States* (1911), 222 U. S. 20, 56 L. ed. 72, and *Morris v. McComb* (1947), 332 U. S. 422, 92 L. ed. 44.

The District Court in its opinion and judgment of December 19, 1961, adopted the Appellees' contention.

V.

THE QUESTIONS ARE SUBSTANTIAL.

The Order of the Interstate Commerce Commission involved herein attempts to regulate an area of intrastate commerce, conducted by interstate motor carriers, which the Congress has reserved to the several States. The legitimacy of this invasion is the salient question before the Court and, therefore, the resolution of such question requires that the Court measure, not the power of the Congress under the Commerce Clause, but the power delegated to the Commission by the Congress through the conduit of the Federal Motor Carrier Act. This effort to regulate intrastate commerce in this area represents a new venture by the Commission. Consequently, this case will establish a pattern either preserving the vitality of State regulation over intrastate commerce conducted by interstate motor carriers, or heralding the death knell of such regulation whose degeneracy would be transmitted by analogy to every facet of intrastate commerce associated with or related to interstate motor carriers.

In exploring the substantiality of the questions, we will first consider the contention that the Order transcends the authority of the ICC and then we will consider the fallacy of the opinion below.

A.

The Order of the Interstate Commerce Commission Is Null and Void Because It Attempts to Regulate Intrastate Commerce and Persons Not Engaged in Commerce and Thereby Transcends the Authority Delegated to the Commission in the Federal Motor Carrier Act.

The conclusion embodied in the headnote is the product of the following rational:

First Premise. The Order of the Interstate Commerce Commission issued under the Federal Motor Carrier Act attempts to regulate intrastate commerce commingled with interstate commerce and persons not engaged in commerce.

Second Premise. The Federal Motor Carrier Act does not authorize the Interstate Commerce Commission to regulate intrastate commerce, even when commingled with interstate commerce, and persons not engaged in commerce.

Third Premise. Intrastate commerce is not deprived of its identity for regulatory purposes by commingling with interstate commerce.

Hence, the conclusion. See *Illinois Central Railroad Co. v. McKendree* (1906), 203 U. S. 514, 51 L. Ed. 298, 27 S. Ct. 163.

In order to facilitate our consideration of this feature of the Brief, we shall compartmentalize it under these Premises.

FIRST PREMISE.

The Order of the Interstate Commerce Commission Issued Under the Federal Motor Carrier Act Attempts to Regulate Intrastate Commerce Commingled With Interstate Commerce and Persons Not Engaged in Commerce.

In 1887, the Congress enacted what is now Part I of the Interstate Commerce Act to provide primarily for a system of comprehensive regulation of railroad common carriers engaged in interstate commerce and the Interstate Commerce Commission was established to administer the Act.

On August 9, 1935, the President of the United States signed into law the Federal Motor Carrier Act denominated as Part II of the Interstate Commerce Act. The Act contains twenty-seven sections numbered 201 to 227, inclusive, and these sections are codified as 49 U. S. C., Sections 301 to 337, inclusive. The purview of the Act is contained in Section 202 (a) which provides that it shall apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the facilities for such transportation and that the regulation of same is vested in the Interstate Commerce Commission, herein referred to as the ICC.

Section 216 (d) of the Act provides in part that "It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever; or to subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . .". In an effort to further implement this provision, the ICC issued an Order, dated September 22, 1961, adopting regulations

requiring that no motor common carrier of passengers subject to Section 216 shall operate a motor vehicle in interstate or foreign commerce on which the seating of passengers is based upon race, color, creed or national origin, and further requiring that such motor common carrier in the operation of vehicles in interstate or foreign commerce shall not utilize any terminal facilities involving any separation on the basis of race, color, creed or national origin.

In analyzing the effect of these regulations, we should first consider the universally recognized fact that many motor carriers transport both intra- and interstate passengers in the same vehicles and utilize the same terminal facilities as a part of such transportation service. This dual function of these carriers is dictated by economic necessity because it results in reduced rates thereby facilitating competition with other modes of transportation. This economic reality is recognized by all parties to this litigation.[14] We should also recognize that this dualism is not a recent phenomenon, but has been an inherent and pronounced characteristic of passenger motor carriers since their emergence into prominence during World War I. Consequently, an analysis of the regulations in conjunction with these facts reveals that such regulations govern passengers traveling in either intra- or interstate commerce on the same vehicle or utilizing the same terminal facilities. In the case of the terminal facilities, we should also note that the regulations not only govern passengers, but, also local patrons who are not involved in either class of commerce. In substance, the regulations regulate passengers traveling in interstate commerce, passengers traveling in intrastate commerce and local patrons of terminal facilities who are not engaged in commerce.

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[14] Record, p. 3, par. 8, p. 38, par. I.

SECOND PREMISE.

The Federal Motor Carrier Act Does Not Authorize the Interstate Commerce Commission to Regulate Intrastate Commerce, Even When Commingled With Interstate Commerce, and Persons Not Engaged in Commerce.

Keeping the scope of the ICC regulations in mind, we should now consider two provisions of the Interstate Commerce Act. Section 202 (b) creates an exception to the purview of the Act by providing as follows:

> (b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

Section 216 (e) provides the exclusive remedial action by the ICC to rectify violations of the non-discrimination provision of Section 216 (d) and such Section 216 (e) contains the following proviso:

> Provided, however, That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever.

We should note here that a proviso is generally defined as a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause, or of excepting something from its operation which otherwise would have been within it, or of excluding some possible

ground of misinterpretation of it, as by extending it to cases not intended by the legislature to be brought within its purview.[15] The effect of this proviso obviously is to exempt intrastate commerce absolutely from the operation of Section 216.

For the purpose of regulating this area of intrastate commerce, which has been expressly denied the ICC by the Congress, the General Assembly of Georgia has enacted appropriate legislation empowering the Georgia Public Service Commission to eliminate any unjust discrimination imposed by a motor carrier against an intrastate passenger in its rates, fares, charges or service, irrespective of whether the carrier is engaged in intrastate or intra- and interstate commerce.[16] Consequently, as long as the ICC Order remains in effect, it is an obstacle hindering, if not preventing, the exercise of such power vested in the Georgia Commission.[17]

In considering this irreconcilable conflict between Federal and State regulatory authority, we should note the well established rule which requires that, in construing Federal statutes enacted under the power conferred by the Commerce Clause of the Constitution, it should never be held that the Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.[18] This Court has applied

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[15] 83 C. J. S., Statutes, sec. 381, p. 882 and the cases therein annotated.

[16] See authorities set forth in Appendix C, infra, p. 64.

[17] *Dept. of Pub. Works of Wash. v. U. S.* (DC-WD Wash. 1932), 55 F. 2d 392, 394, 1. col., 1 par.

[18] *Illinois Central R. Co. v. State Pub. Utilities Com. of Ill.* (1918), 245 U. S. 493, 510, 1st par., 62 L. ed. 425, 38 S. Ct. 170. See also: *Palmer v. Massachusetts* (1939), 308 U. S. 79, 83, 2d

such postulate in construing the Federal Motor Carrier Act. *California v. Zook* (1949), 336 U. S. 725, 733, 2d par., 93 L. ed. 1005, 1011, r. col., 2d par., 69 S. Ct. 841.

Furthermore, the ICC only has such jurisdiction as has been delegated to it by the Congress and, therefore, acts performed beyond such a delegated sphere are void.[19] Consequently, the ICC obviously does not have authority to enforce civil rights legislation or to protect rights guaranteed by the Fourteenth Amendment. An admission to this effect was made by counsel for the United States in oral argument before the District Court.[20] Also, we are not engaged here in undertaking to construe an Act of Congress that deals with matters and things that may affect interstate commerce, nor are we undertaking to determine the scope of the power of Congress to regulate such matters or things. We are construing an Act in which Congress expressly provided that the ICC should not have

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par., 84 L. ed. 93, 97, r. col., 2d par.; *H. P. Welch Co. v. New Hampshire* (1939), 306 U. S. 79, 85, 1st par., 83 L. ed. 500, 505, l. col., hdn. 4; *Gilzary v. Cuyahoga Valley Ry. Co.* (1934), 292 U. S. 57, 60, 3d par., 78 L. ed. 1123, 1126, l. col., hdn. 2; *Mintz v. Baldwin* (1933), 289 U. S. 346, 350, 1st par.; *Missouri, Kansas & Texas Ry. Co. of Texas v. Harris* (1914), 234 U. S. 412, 418, 1 par., 58 L. ed. 1377, 1382, l. col., 1 par.; *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.* (1909), 211 U. S. 612, 623, 1 par.; *Cooley v. Bd. of Wardens of Port of Philadelphia* (1851), 53 U. S. (12 How.) 299, 320, 1 par., 13 L. ed. 996, 1005, r. col., 2d par.

[19] *City of Yonkers v. U. S.* (1944), 320 U. S. 685, 691, 2d par., 88 L. ed. 400, 404, l. col., 1 par., 64 S. Ct. 327; *Atchison, Topeka & Santa Fe Ry. Co. v. U. S.* (1932), 284 U. S. 248, 262, 2d par., 76 L. ed. 273, 281, r. col., hdn. 5, 52 S. Ct. 146; *U. S. v. Chicago, M. St. P. & P. R. Co.* (1931), 282 U. S. 311, 324, 75 L. ed. 359, 364, l. col., hdn. 2, 75 L. ed. 359; *Pa. R. Co. v. Fox & London, Inc.* (C. C. A. 2d 1938), 93 F. 2d 669, 670, r. col., 1 par.; *Montgomery Ward & Co., Inc., v. Northern Pacific Terminal Co. of Ore.* (D. C. Ore. 1953), 128 F. Supp. 475, 504, r. col., 2d par.; *Baggett Transp. Co. v. U. S.* (D. C. N. D. Ala. 1953), 116 F. Supp. 167, 170, l. col., 2d par.

[20] Record, p. 116.

the power to interfere with the exclusive exercise by the State of the power to regulate intrastate commerce by motor vehicle. The Act demonstrates an intent on the part of Congress to confine the power of the ICC in the regulation of motor vehicular transportation in interstate commerce to a much narrower scope than is often afforded governmental agencies in the regulation of other activities and phases of interstate commerce.[21]

At this point, we should also note some of the authorities relied upon by the Appellees to support the Order. The United States Department of Justice in its advocacy of the adoption of the Order before the ICC and the ICC in its Report supporting the adoption of the Order relied upon the following seven cases as authority therefor: *Boynton v. Virginia*;[22] *American Trucking Assn. v. United States*;[23] *Morgan v. Virginia*;[24] *Baldwin v. Morgan*;[25] *Browder v. Gayle*;[26] *NAACP v. St. Louis-San Francisco Ry. Co.*;[27] and *Keys v. Carolina Coach Co.*[28]. None of these cases support the Order because they are easily distinguishable.

Boynton, NAACP and *Keys* concerned interpretations of the non-discriminatory provisions of the Federal Motor

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[21] *ICC v. Columbus & G. Ry. Co.* (C. C. A. 5th, 1946), 153 F. 2d 194, 196, l. col., 2d par.; *Lowe v. Stoutamire* (1936), 166 So. 310, 312, r. col., 2d par., 123 Fla. 135; *All American Bus Lines v. Hawkins* (Tex. Civ. App. 1945), 188 S. W. 2d 992, 997 (3).

[22] (1960) 364 U. S. 454, 5 L. ed. 2d 206.

[23] (1953) 344 U. S. 298, 97 L. ed. 337, 73 S. Ct. 307.

[24] (1946) 328 U. S. 373, 90 L. ed. 1317.

[25] (C. A. 5th, 1961) 287 F. 2d 750.

[26] (D. C. M. D. Ala., 1956) 142 F. Supp. 707, affd. 352 U. S. 903, 1 L. ed. 2d 114, 77 S. Ct. 145.

[27] (1955) 297 I. C. C. 335.

[28] (I. C. C. 1955), 64 M. C. C. 769.

Carrier Act as applied to interstate passengers and *not* intrastate passengers. *Morgan*, *Baldwin* and *Browder* did not involve the Act, but concerned the constitutionality of State statutes or municipal ordinances, requiring the segregation of whites and Negroes on motor carriers or in terminal facilities, under the commerce clause of or the Fourteenth Amendment to the Federal Constitution. *Baldwin* also involved the Civil Rights Acts. Obviously, the ICC has no power to enforce the authority relied upon by these three decisions. *American Trucking* concerned the validity of ICC rules imposing restrictions on the leasing or interchange of equipment by motor carriers engaged in interstate commerce and did not concern, either directly or by analogy, the posture of intrastate passengers when commingled with interstate passengers or of persons not engaged in commerce utilizing interstate terminal facilities.

The crux of this case lies in the interpretation of Section 202 (b) and the proviso of Section 216 (e).

The scope of the ICC regulations manifestly conflicts with the plain and literal interpretation of Section 202 (b) and the proviso of Section 216 (e). Consequently, it is Georgia's contention that the intrastate commerce exemptions are unambiguous and require no interpretation and, therefore, the regulations should be declared null and void for transcending the delegated authority of the ICC. However, even if the Court should determine that an ambiguity lurks within the breath of the exemption and that, therefore, statutory construction should be utilized, the Court will find that the construction substantiates the plain meaning of the language.

In order to discern the precise dimensions of the intrastate commerce exemption it is necessary that we seek the Congressional intent. Since the intention of the Congress,

embodied in the Act, is the law, the fundamental rule of construction is that the Court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or inconsistent with the organic law of the Nation, to the intention or purpose of Congress as expressed in the Act.[29] In order to determine the legislative intent in case of ambiguity, resort may be had to the history of the statute, and, more specifically, resort may be had to its legislative history or the history of the proceedings attending its actual passage through the legislature.[30] Furthermore, it has been held that debates or discussions in harmony with a fair construction of a statute are highly persuasive in arriving at the legislative intention, or in confirming and vindicating a construction at which the Court has already arrived, and that they may be resorted to as a means of ascertaining the history of the period when the statute was enacted, the general object of the legislation, and the evil sought to be remedied.[31]

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[29] 82 C. J. S., Statutes, Sec. 321, p. 560 and the cases therein annotated.

[30] *Colony, Inc. v. Com'r of Internal Revenue* (1958), 357 U. S. 28, 33, 2d par., 2 L. ed. 2d 1119, 1123, hdn. 2, 78 S. Ct. 1033; *U. S. v. Witkovich* (1957), 353 U. S. 194, 199, 2d par., 1 L. ed. 2d 765, 769, r. col., 2d par., 77 S. Ct. 779; *Offutt Housing Co. v. County of Sarpy* (1956), 351 U. S. 253, 260, 2d par., 100 L. ed. 1151, 1159, r. col., hdn. 7, 76 S. Ct. 814; *U. S. v. Pub. Utilities Com. of Cal.* (1953), 345 U. S. 295, 315, 2d par., 97 L. ed. 1020, 1037, l. col., 1 par., 73 S. Ct. 706, reh. den. 345 U. S. 961, 97 L. ed. 1380, 73 S. Ct. 935; *U. S. v. Universal C. I. T. Credit Corp.* (1952), 344 U. S. 218, 222, 2d par., 97 L. ed. 260, 264, r. col., hdn. 6, 73 S. Ct. 227.

[31] *Humphrey v. U. S.* (1935), 295 U. S. 602, 625, 3d par., 79 L. ed. 1611, 1617, r. col., hdn. 3, 55 S. Ct. 869; *Com'r of Internal Revenue* (CCA-2d-1946), 156 F. 2d 800, 802, r. col., hdn. 2, cert. den. 329 U. S. 782, 91 L. ed. 671, 67 S. Ct. 203; *Continental Grain Co. v. Dant & Russell* (CCA-9th—1941), 118 F. 2d 967, 969, l. col., hdns. 6 & 7; *Twin Parts Oil Co. v. Pure Oil Co.* (DC-D Minn. 1939), 26 F. Supp. 366, 373, l. col., hdn. 10; Pet. of Bone (DC-ED Mich. 1937), 19 F. Supp. 219, 221, r. col. hdn. 2.

The crucial feature in reviewing the legislative history of the Federal Motor Carrier Act, is to determine whether or not the Congress intended that the ICC have the authority to regulate intrastate commerce for the purpose of removing burdens against interstate commerce. The ICC clearly possesses such authority in Part I of the Interstate Commerce Act because in 1914 the Supreme Court of the United States rendered a momentous decision delineating the inter-relationship between intra- and interstate commerce in the matter of regulating railroad rates. The decision has become popularly known as the *Shreveport Rate Case*[32] and is well analyzed in the following terms:[33]

> The principle of the Shreveport decision may be stated as follows: Congress, through its agency, the Interstate Commerce Commission, may intervene in the regulation of intrastate commerce when it deems such intervention necessary and appropriate for the protection of interstate commerce; in such cases the national authority is paramount and may be exercised even to the extent of nullifying state regulation of commerce wholly within the state. The actual facts in the Shreveport cases involved a complicated relationship between state commodity rates and interstate class rates. To clarify the discussion and avoid the complications of technical rate terminology, the principle of the Shreveport cases will be brought out by a somewhat simplified illustration, without, however, distorting the substance of the decision.
>
> Let us suppose that Texas through its Railroad Commission had fixed a maximum rate on furniture

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[32] *Houston, E. & W. T. R. Co. v. U. S.* (1914), 234 U. S. 342, 58 L. ed. 1341, 34 S. Ct. 833.

[33] *The Distribution of Power to Regulate Interstate Carriers Between the Nation and the States* (1928), by George G. Reynolds, Ph. D., pp. 140-142.

of 20 cents per hundred pounds from Dallas, Texas, to X, a Texas point equally distant from Dallas and Shreveport, Louisiana. At the same time, the railroad applied a rate of 50 cents on the interstate haul of the same commodity from Shreveport to X. Dallas and Shreveport are competing jobbing centers. The Interstate Commerce Commission, on complaint of the Railroad Commission of Louisiana, declared that rate situations of which this is typical were unjustly discriminatory against the merchants of Shreveport, further found that any rate above 30 cents for the interstate haul from Shreveport to X was unreasonable, and ordered the railroad to establish a rate that, first, should not exceed 30 cents, and second should not exceed the rate applied by the railroad for the intrastate haul of the same commodity from Dallas to X. Please note the care with which the Interstate Commerce Commission avoided saying what the intrastate Texas rate should be. A simple enough situation one would say at first glance; the railroad merely had to establish an interstate rate of 20 cents and both its federal and state masters would be obeyed. But the railroad was unwilling to forego the enjoyment of a 30-cent interstate rate, implicitly recognized as reasonable by the only authority which had jurisdiction over it, and sought relief in the Commerce Court. The case was carried to the Supreme Court and the result was the Shreveport decision.

A few extracts will be quoted from the opinion, again by Mr. Justice Hughes:

Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and

the state, and not the nation, would be supreme within the national field. . . .

It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden. . . .

In removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. . . .

It was recognized at the beginning that the nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control. . . .

So far as these interstate rates conformed to what was found to be reasonable by the Commission, the carriers are entitled to maintain them, and they are free to comply with the order by so adjusting the other rates, to which the order relates, as to remove the forbidden discrimination.[34]

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[34] *Spokane & I. E. R. R. v. United States* (1916), 241 U. S. 344.

We might paraphrase Mr. Justice Hughes' decision as applied to our illustration of the Shreveport cases, somewhat as follows: "In interstate commerce there is only one master, Congress. This master has forbidden you to discriminate against the interstate commerce of Shreveport and has given you permission to charge 30 cents on the interstate haul from Shreveport to X; on both these subjects his authority is supreme. The command of your state master to charge only 20 cents for the state haul from Dallas to X presents a dilemma. One horn is to charge more than 20 cents from Shreveport to X which is disobedience of the congressional command not to discriminate against interstate commerce. The other horn is to charge only 20 cents from Shreveport to X, which in effect establishes a maximum interstate rate lower than that authorized by congressional authority. Both horns concern interstate commerce of which there is but the one master, Congress. Therefore you may with impunity disregard your state master's command." Thus the Supreme Court virtually wrote into the order of the Interstate Commerce Commission the following clause:

> "We hereby find that a state rate of 30 cents on furniture from Dallas to X is not unreasonable, the laws of the state of Texas to the contrary notwithstanding." This, of course, is federal regulation of intrastate rates, and the decision establishes the constitutionality of such regulation when necessary and appropriate for the protection of interstate commerce.

The Doctrine of the *Shreveport* case was expressly ratified by the Congress in its enactment of Section 416 of the Transportation Act of 1920,[35] divesting the States of exclusive jurisdiction to regulate intrastate railroad rates and empowering the ICC to remove "any undue or unreason-

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[35] 49 U. S. C., sec. 13 (4).

able advantage, preference, or prejudice, as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand . . ., the law of any state or the decision or order of any state authority to the contrary notwithstanding." The Congressional ratification was sustained by the Supreme Court in the case of *Railroad Comm. of Wis. v. Chicago, B. & O. R. Co.*[36] wherein Mr. Chief Justice Taft, speaking for the Court, said "Commerce is a unit and does not regard State lines, and while under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority."

The *Shreveport Doctrine* virtually devitalized State regulation of railroads and relegated it to a token participation which has continued to this day.

During World War I the motor carrier industry ascended to national prominence which was accompanied by regulation to some degree by all the States. In the absence of Federal legislation the States attempted to regulate interstate motor carriers in the same way that they regulated intrastate carriers operating over their highways. But because of the commerce clause, State regulation has its vulnerable spots so far as interstate carriers are concerned. In the pivotal case of *Buck v. Kuykendall*,[37] decided in

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[36] (1922), 257 U. S. 563, 588, 2d par., 66 L. ed. 371, 383, 1. col., 2d par., 42 S. Ct. 232, 237.

[37] (1925), 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A. L. R. 286. See also *Bush & Sons Co. v. Maloy* (1925), 267 U. S. 317, 69 L. ed. 627, 45 S. Ct. 326.

1925, the Supreme Court laid bare before unsuspecting State commissioners the Achilles heel in the system of State regulation; it held that the States could not, in the interests of an economically sound transportation system, compel interstate motor carriers to show that public convenience and necessity required the transportation service which they were rendering or were proposing to render. The *Buck* decision placed the State commissioners in a dilemma. In general, it had been the policy of the National Association of Railroad and Utility Commissioners, herein referred to as NARUC, to oppose any further extension of Federal regulation. They had seen the ICC, acting on the authority of the *Shreveport* case, the principal of which was later embodied in the National Transportation Act of 1920,[38] set aside intrastate rail rates that were found to burden interstate commerce. Consequently, they were reluctant to see the Federal Government occupy other fields of regulation for fear that Federal regulation would again encroach upon the jurisdiction of the State Commissioners in intrastate matters. But despite this general aversion to any further extension of Federal control, the State commissioners were willing to concede that the decision in the *Buck* case rendered imperative some kind of Federal legislation with respect to interstate motor carriers. The problem then was to minimize the degree of Federal control.[39]

Inspired by fear of the *Shreveport Doctrine*, NARUC exerted its influence upon the members of Congress. The success of its efforts are amply evidenced by the language of Section 202 (b) and the proviso of Section 216 (e) of the Act. Furthermore, the transformations undergone by

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[38] See footnote 35.

[39] Utilization of State Commissioners (1935), 34 Mich. L. Rev. 37.

this language in its passage through the Congress is most illuminating in reflecting the precise legislative intent.

The prenatal name of the Federal Motor Carrier Act of 1935 was Senate Bill 1629 in the 1st Session of the 74th Congress. The Senate Report accompanying the Bill recognized that "The State regulatory commissions are strongly urging Congress to enact Federal regulation to 'stop the gaps' in State regulation and to enable them more effectively to regulate intrastate transportation."[40] The Bill was introduced by Senator Wheeler of Montana at the request of Mr. Joseph B. Eastman, the Federal Coordinator of Transportation.[41] The Bill was drafted originally by Coordinator Eastman and approved by the ICC which transmitted it to the Congress.[42] Section 202 (b) immediately prior to its consideration by the Senate appeared in the following form:[43]

> Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State. It is not intended hereby to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof, and notwithstanding this part, the intrastate operations of motor carriers on the highways of a State shall continue to be subject to the laws of the State regulating such intrastate commerce; *Provided, however, That this shall not be construed to prevent the Commission from exercising its authority to protect persons and*

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[40] Senate Rep. No. 482, p. 3, 3d par., 74th Cong., 1st Sess. (1935).

[41] 79 Cong. Rec. 5650, l. col. (1935).

[42] 79 Cong. Rec. 5651, l. col., 12207, r. col. (1935).

[43] 79 Cong. Rec. 5658, r. col. (1935).

localities in interstate commerce against undue or unreasonable disadvantage or prejudice caused by any rate, fare, charge, classification, regulation, or practice of motor carriers made or imposed by authority of any State. (Emphasis supplied.)

The emphasized language of course embodies the *Shreveport Doctrine* as desired by the ICC.

On April 15, 1935, an amendment to Section 202 (b) proposed by the Committee on Interstate Commerce was agreed to by the Senate thereby altering the provision into the following form:[44]

> Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof, *except where and only to the extent that such regulation causes undue or unreasonable disadvantage or prejudice to persons or localities in interstate commerce.* (Emphasis supplied.)

The amendment although narrowing the language retained the *Shreveport Doctrine* as indicated by the emphasized language and deleted the word "exclusive" which had modified the word "exercise" contained in the provision. At the time this amendment was agreed to, Senator Duffy of Wisconsin advised the Senate that NARUC was opposed to the then language of Section 202 (b) and that he intended to offer an amendment at a later time.[45]

Section 216 (e) as originally drafted and as amended by the Senate pursuant to the Committee recommendation

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[44] 79 Cong. Rec. 5658, r. col. (1935).

[45] 79 Cong. Rec. 5658, r. col. (1935).

did not contain the proviso exempting intrastate commerce.[46]

On April 16, 1935, a colloquy occurred in the Senate involving Senators Duffy, Wheeler and Gore of Oklahoma.[47] A reproduction of the colloquy is in Appendix D, infra, p. 67. Therein Senator Duffy sponsored an amendment to the then Section 202 (b) and stated that such amendment was proposed by NARUC, which at that time represented forty-six of the State commissions. He stated that the then Section 202 (b) incorporated the *Shreveport Doctrine* and that the ICC desired to have the same broad powers over motor carriers that it had over railroads. He further stated that the reason for rejecting the *Shreveport Doctrine* from Federal motor carrier regulation was because approximately 80% of motor carrier transportation was intrastate and that the small motor carrier operator does not have "the facilities which the ordinary railroad company has, for instance, for coming here to Washington to defend himself or to appear before the Interstate Commerce Commission." He further stated, in effect, that the rejection of the *Shreveport Doctrine* did "reserve to the various State commissions the power they now have, and which clearly would be taken away under this Bill if it should be passed in the language in which the Committee has reported it to the Senate."

Senator Wheeler denied that the then Section 202 (b) would bestow upon the ICC the same broad powers over motor carriers that it has over railroads, but admitted that it did incorporate the *Shreveport Doctrine* and that the members of the Committee favor such incorporation. Senator Wheeler further stated that he "rather favored

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[46] 79 Cong. Rec. 5667, r. col. (1935).

[47] 79 Cong. Rec. 5735-5737, r. col. (1935).

the idea of leaving out of this Bill the Shreveport Doctrine" and that he had no objection to its elimination.

Senator Gore stated that he also desired that the *Shreveport Doctrine* be eliminated from the then Section 202 (b) and, therefore, proposed an amendment to the provision striking the following language: "except where and only to the extent that such regulation causes undue or unreasonable disadvantage or prejudice to persons or localities in interstate commerce". The amendment was agreed to by the Senate without any recorded objection. This amendment placed Section 202 (b) in the following form:

> Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

This form is identical with the present form except that the word "exclusive" modifying the word "exercise" was not inserted at that time.

Thereafter the Bill was ordered to be engrossed for a third reading, read the third time and passed the Senate.[48]

On July 31, 1935, the House of Representatives initiated debate on Senate Bill 1629. During the debate there were numerous references to the effect that the Bill would have upon the regulatory powers of the State commissions. Representative Harlan of Ohio stated that by virtue of the joint boards "this bill gives the States a power over interstate commerce that they have never had before" and that "Instead of being a bill centralizing power in the Federal

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[48] 79 Cong. Rec. 5737, r. col. (1935).

Government it gives the States additional power that they have never had."[49] He further stated that the Bill has nothing to do with intrastate commerce[50] and that "It gives the States more rights to control intrastate commerce than they ever had before."[51]

Speaker Rayburn of Texas stated that the purpose of the Bill is "to regulate traffic that no State can regulate."[52]

Representative Snell of New York stated that "As I understand this bill, it does not go any further than a great many States have gone in the regulation of this business" and that "It simply regulates that part of the bus and truck business that is now engaged in interstate commerce in practically the same way intrastate commerce is now regulated, and which the individual States cannot regulate at the present time."[53] This view was concurred in by Representative Holmes of Massachusetts.[54]

Representative Terry of Arkansas stated that "The point is emphasized that the bill does not affect matters that are exclusively intrastate."[55]

Representative Michener stated as follows:

> "In conclusion, let me say that I shall vote for this bill, because I believe a majority of the people of my district, as well as the country, who are familiar with

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[49] 79 Cong. Rec. 12196, r. col. (1935).

[50] id.

[51] 79 Cong. Rec. 12197, l. col. (1935).

[52] 79 Cong. Rec. 12204, r. col. (1935).

[53] 79 Cong. Rec. 12214, r. col. (1935).

[54] id.

[55] 79 Cong. Rec. 12210, r. col. (1935).

this legislation favor it. They favor it, not because it is advocated by any group or bloc but because it is necessary, forward-looking regulation of that part of our transportation system which is not now regulated, and which can only be regulated through Federal action. Let us not interfere with the rights of the State, but let us perform our constitutional function and assist the States in enforcing the regulations made by the several State commissions."[56]

Furthermore, it was recognized that NARUC supported the Bill as amended by the Senate which eliminated the *Shreveport Doctrine*.[57]

During the debate, the following committee amendments were reported to the House: insertion of the phrase "engaged in interstate or foreign commerce" in Section 202 (a); insertion of the word "exclusive" to modify the word "exercise" in Section 202 (b);[58] and the insertion of the proviso at the end of Section 216 (e).[59] The House Report recommending the adoption of these amendments, provided in part as follows:

> The bill as now reported has the endorsement of the State commissions who urge its speedy adoption. . . .[60]
>
> An amendment has been made by the committee which prohibits the extension of Federal regulation in intrastate transportation as exercised under authority

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[56] 79 Cong. Rec. 12279, r. col. (1935).

[57] 79 Cong. Rec. 12209, l. col. 12210, l. col. 12213, r. col. (1935).

[58] 79 Cong. Rec. 12215, r. col. (1935).

[59] 79 Cong. Rec. 12233, r. col. (1935).

[60] House Rep. No. 1645, p. 3, 5th par., 74th Cong., 1st Sess. (1935).

of the decision of the Supreme Court in the Shreveport case and of the provisions of section 13 (4) of the Interstate Commerce Act."[61]

These amendments were agreed to by the House thereby placing Section 202 (a) and (b) and the proviso in their present form.[62] These amendments further negated the application of the *Shreveport Doctrine* under the Act and further guaranteed that the States would have exclusive control over intrastate commerce.

On August 1, 1935, the Bill passed the House[63] and on August 5, 1935, the President pro tempore laid before the Senate the House amendments to the Bill and the same were concurred in by the Senate.[64] The Bill was signed into law by the President on August 9, 1935.[65]

Our examination of the passage of the Act unequivocally reveals that the regulation of intrastate commerce is left wholly to the States and the ICC is expressly deprived of any jurisdiction over any facet of such commerce for the purpose of correcting discriminations against interstate commerce or otherwise. The Act expressly negates any possibility of the *Shreveport Doctrine*.[66] Counsel for the United States concurs in such negation by virtue of his admission made in oral argument before the District Court.[67]

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[61] id. p. 4, 9th par.

[62] See footnotes 58 and 59.

[63] 79 Cong. Rec. 12279, l. col. (1935).

[64] 79 Cong. Rec. 12459, r. col., 12460, l. col. (1935).

[65] 79 Cong. Rec. 12863, l. col. (1935).

[66] 36 Columbia Law Rev. 961 (1936).

[67] Record, p. 110, 1 par.

THIRD PREMISE.

Intrastate Commerce Is Not Deprived of Its Identity for Regulatory Purposes by Commingling With Interstate Commerce.

It is well established that Federal statutes regulating commerce have no application to intrastate commerce.[68] The Federal Motor Carrier Act is no exception to this generality, and expressly withholds from the ICC the power to regulate intrastate commerce.[69] However, the

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[68] *Arkadelphia Milling Co. v. St. Louis S. W. R. Co.* (1919), 249 U. S. 134, 151, 1 par., 63 L. ed. 517, 527, l. col., 1 par.; *Jax Beer Co. v. Redfern* (C. C. A. 5th, 1941), 124 F. 2d 172, 173, r. col., hdn. 1; *Foster & Kleiser Co. v. Special Site Sign Co.* (C. C. A. 9th. 1936), 85 F. 2d 742, 753, l. col., hdn. 15; *Chicago, M., St. P. & P. R. Co. v. Campbell River Mills Co.* (C. C. A. 9th, 1931), 53 F. 2d 69, cert. den. 285 U. S. 536, 76 L. ed. 930, 52 S. Ct. 310; *Brenner v. Texas Co.* (D. C.-N. D. Cal. 1956), 140 F. Supp. 240, 243, l. col. hdn. 5; *Building Ser. Employees International Union v. Trenton Trust Co.* (D. C.-D. N. J., 1943), 53 F. Supp. 129, 130, r. col., hdn. 1, aff'd (C. C. A. 3d, 1944), 142 F. 2d 257; *Moses v. McKesson & Robbins* (D. C.-S. D. Tex. 1942), 43 F. Supp. 528, 529, l. col., hdn. 2; *Prescription House v. Anderson* (D. C.-S. D. Tex., 1941), 42 F. Supp. 874, 878; *Fleming v. American Stores Co.* (D. C.-E. D. Pa., 1941), 42 F. Supp. 511, 522, r. col., hdn. 7, 524, r. col., hdn. 9, mod. on other grounds, 133 F. 2d 840; *Cudahy Packing Co. of Ala. v. Bazanos* (1943), 15 So. 2d 720, 723, l. col., hdn. 1, 245 Ala. 73; *Taylor v. Central of Ga. Ry. Co.* (1923), 121 S. E. 348, 351, r. col., hdn. 5, 31 Ga. App. 374; *New Jersey Bell Tel. Co. v. Pa.-Reading Seashore Lines* (1950), 78 A. 2d 150, 152, l. col., hdn. 1, 11 N. J. Super. 129; *Carlo v. Okonite-Callender Cable Co.* (1949), 69 A. 2d 734, 737, r. col., hdn. 3, 3 N. J. 253; *Rosecob Frocks v. Rose* (1945), 52 N. Y. S. 2d 901; *Borelli v. International Ry. Co.* (1925), 147 N. E. 356, 240 N. Y. 54, cert. den. 269 U. S. 557, 70 L. ed. 410; 15 C. J. S., Commerce, Sec. 24, p. 289.

[69] *Eichholz v. Hargus* (D. C.-W. D. Mo. 1938), 23 F. Supp. 587, 589, r. col., hdn. 2, aff'd 306 U. S. 268, 273, 3d par., 83 L. ed. 641, 645, r. col., hdn. 3, 59 S. Ct. 532; *I. C. C. v. Columbus & G. Ry. Co.* (C. C. A. 5th 1946), 153 F. 2d 194, 196, l. col., 2d par.; *Hughes Transp. v. U. S.* (Ct. of Claims, 1954), 121 F. Supp. 212, 222, l. col., hdn. 3; *Tucker v. Casualty Reciprocal Exchange* (D. C.-N. D. Ga. 1941), 40 F. Supp. 383, 385; *Al American Bus Lines v. Hawkins* (Tex. Civ. App. 1945), 188 S. W. 2d 992, 993 (1), 997 (3); *Tips v. Railroad Com. of Tex.* (Tex. 1937), 110 S. W. 2d 585, 586, r. col., hdn. 4.

crucial question to be resolved is whether or not the commingling of intra- and interstate passengers causes the intrastate component to become indistinguishable for purposes of regulation. The law is abundantly clear that the character of intrastate commerce is not annihilated by such commingling, but that its identity is preserved.

It is firmly established that transportation from and to points within the same State and which is not a part of any continuous transportation to or from another State, is intrastate commerce and subject to State control,[70] even though it is carried on by an instrument engaged in interstate commerce.[71] This truism as applied to the Federal

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[70] *Stephenson v. Binford* (D. C.-S. D. Tex. 1931), 53 F. 2d 509, 516, l. col., hdn. 10, aff'd, 287 U. S. 251, 77 L. ed. 288, 87 A. L. R. 721; *Southern Pac. Co. v. Van Hoosear* (C. C. A. 9th 1934), 72 F. 2d 903, 906, r. col., hdn. 3; *Chicago, M., St. P. & P. R. Co. v. Campbell River Mills Co.* (C. C. A. 9th 1931), 53 F. 2d 69, 72, r. col., hdn. 4, cert. den. 285 U. S. 536, 76 L. ed. 930, 52 S. Ct. 310; *Atlantic Coast Line Ry. Co. v. Railroad Com. of Ga.* (D. C.-N. D. Ga. 1922), 281 F. 321, 324, hdn. 4; *Kansas City Southern Ry. Co. v. Brooks* (1907), 105 S. W. 93, 94, r. col., 3d par., 84 Ark. 233; *Baine v. Murphy* (1947), 70 N. Y. S. 2d 295; *Smith v. State* (1919), 181 P. 942, 943, l. col., hdn. 1, 16 Okla. Cr. 648; *Motor Transport Co. v. McCanless* (1945), 189 S. W. 2d 200, 182, Tenn. 649; *Railroad Com. of Tex. v. Sun Oil Co.* (Tex. 1957), 302 S. W. 2d 191, 194, r. col., hdn. 4, revd. on other grounds, 311 S. W. 2d 235, 158 Tex. 292; 15 C. J. S., Commerce, Sec. 24, p. 289.

[71] *New York Central R. Co. v. Mohney* (1920), 252 U. S. 152, 64 L. ed. 502, 40 S. Ct. 287, 9 A. L. R. 496; *Southern Pacific Co. v. Arizona* (1919), 249 U. S. 472, 63 L. ed. 713; *Stone v. Dunn Bros.* (1955), 80 S. 2d 802, 806, r. col., hdn. 1, 224 Miss. 762, sug. err over 81 S. 2d 712, app. dism. for no sub. fed. q., 350 U. S. 878, 100 L. ed. 775, 76 S. Ct. 139, reh. den. 350 U. S. 943, 100 L. ed. 822, 76 S. Ct. 299; *Hudson Bus Transp. Co. v. Bd. of Pub. Utility Com'rs* (1944), 37 A. 2d 636, 639, l. col. hdn. 7, 131 N. J. L. 576; *Blackmore v. Pub. Ser. Com.* (1936), 183 A. 115, 118, l. col., hdn. 4, 120 Pa. Super. 437; *McCutchen v. Atlantic Coast Line R. Co.* (1908), 61 S. E. 1108, 1110, l. col., 3d par., 81 So. C. 71; *St. Louis, B. & M. Ry. Co. v. True Bros.* (Tex. 1911), 140 S. W. 837, 839, r. col., hdn. 5; *Luken v. Lake Shore & M. S. Ry. Co.* (1911), 94 N. E. 175, 178, r. col., 248 Ill. 377, 140 Am. St. Rep. 220, 21 Ann. Cas. 251; *Hockfield v. Southern Ry. Co.* (1909), 64 S. E. 181, 182, l col., 1 par., 150 N. C. 419, 134 Am. St. Rep. 954;

Motor Carrier Act was well articulated in *Tucker v. Casualty Reciprocal Exchange*[72] wherein the Court opined as follows:[73]

> It is, of course, well recognized that where Congress assumes the regulation and control of interstate commerce its power is supreme and any State regulations to the contrary are of no effect. However, the Motor Carrier Act of 1935 is not only a case where Congress does not assume to occupy the entire and exclusive field of transportation by motor carriers, but, on the contrary, evidences by explicit language an express intention to leave intrastate commerce by motor carriers to the control of the several States. Its declaration of policy, Title 49, § 302 (*e*), U. S. C. A., provides: "Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."
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> Thus Congress expressly states the recognized fact that there are two fields of transportation: one interstate, the other intrastate, and that the regulation it provided was confined to interstate commerce. A carrier operating exclusively interstate is subject only to the Acts of Congress and the regulations of the Inter-

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Humble Oil & Refining Co. v. Texas & Pacific Ry. Co. (1955), 289 S. W. 2d 547, 552, r. col., hdn. 2, 155 Tex. 483; *Chicago, M. & St. P. R. Co. v. Iowa* (1914), 233 U. S. 334, 343, 2d par., 58 L. ed. 988, 992, r. col., 1 par.; *Bechtr-Bartlett-Lockerby Co. v. Northern Pac. Ry. Co.* (1924), 197 N. W. 103, 158 Minn. 77; 15 C. J. S., Commerce, Sec. 24, p. 289. See also: *Lone Star Gas Co. v. Texas* (1938), 304 U. S. 224, 238, 82 L. ed. 1304, 1314, 58 S. Ct. 883, reh. den., 304 U. S. 590, 82 L. ed. 1549, 58 S. Ct. 1051.

[72] (D. C.-N. D. Ga. 1941), 40 F. Supp. 383.

[73] id. p. 385, l. col.

state Commerce Commission thereunder. But the Act does not purport to regulate all acts and matters indirectly related to interstate transportation by motor carriers. See *California v. Thompson*, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219, decided April 28, 1941. If a carrier desires to carry on intrastate transportation, whether in connection with its interstate transportation or as exclusively intrastate transportation, it must, under the express provisions of the Motor Carrier Act (regardless of any other consideration that might be mentioned), comply with the valid regulations of the State Commissions.

The two types of transportation and the consequences resulting therefrom are clearly recognized and delineated by the decision in *Eichholz v. Public Service Commission of Missouri*, 306 U. S. 268, 273, 59 S. Ct. 532, 534, 83 L. Ed. 641. As there stated, a carrier under the Motor Carrier Act of 1935 has "his choice either to refrain from carrying property between points in (the State) or to secure a certificate of public convenience and necessity as an intrastate carrier." In this case, having exercised a choice to secure such certificate as an intrastate carrier, he is bound equally by the terms of his contract as he is by the provisions of the Motor Carrier Act of 1935 and his contract thereunder. In case of injury to a fellow traveler upon the highways used by the insured carrier under the authority of such certificate, as is true in the present instance (by which is removed any question of the interstate relation of a passenger or shipper), certainly such injured citizen is entitled to rely upon the protection required by the State Commission.

In *Sprout v. South Bend*[74] the Plaintiff was operating a motor bus for passengers between South Bend, Indiana, and

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[74] (1928) 277 U. S. 163 (3), 62 L. ed. 833, 48 S. Ct. 502, 62 A. L. R. 45.

Niles, Michigan. He required all passengers from South Bend to pay fare to Michigan, but habitually allowed those desiring to do so to alight in the suburbs short of the State line. One of the questions presented in the case was whether or not such a practice involved intrastate commerce. The Supreme Court, speaking through Mr. Justice Brandeis, answered the question in the affirmative as follows:[73]

> The claim that the ordinance violates the commerce clause presents questions requiring serious consideration. Sprout did not carry passengers from one point in South Bend to another. He was not a local carrier. Primarily his business was interstate. But the agreed facts show that he was not engaged exclusively in interstate commerce. The distance from the north city limits of South Bend to Niles is about nine miles. Half of this distance lies within Indiana. Along the highway traversed within that state lie many suburban residences and one village tributary to South Bend. Sprout purported to offer transportation from that city only to persons destined to points in Michigan. He required that all passengers from South Bend pay the fare to some Michigan point. But, in fact, he he served surburban passengers. He made stops habitually at points within Indiana in order to permit passengers from South Bend to leave the bus before the state-line was reached. The legal character of this suburban bus traffic was not affected by the device of requiring the payment of a fare fixed for some Michigan point or by Sprout's professing that he sought only passengers destined to that state. The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of

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[73] id., U. S. 168, 1st par., L. ed. 836, 1. col., 1 par.

the commerce. Compare *Philadelphia & R. R. Co. v. Hancock*, 253 U. S. 284, 64 L. ed. 907, 40 Sup. Ct. Rep. 512; *Baltimore & O. S. W. R. Co. v. Settle*, 260 U. S. 166, 171, 78 L. ed. 189, 192, 43 Sup. Ct. Rep. 28. The suburban traffic was intrastate commerce.

The criterion that "the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce" has been frequently reiterated by the Court.[76]

Furthermore, it is well recognized that a carrier commingling interstate and intrastate commodities or passengers subjects itself to State regulation as to the intrastate component.[77] This doctrine of separability is well

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[76] *New York, N. H. & H. R. Co. v. Nothnagle* (1953), 346 U. S. 128, 130, 2d par., 96 L. ed. 1500, 73 S. Ct. 986; *Atchison, Topeka & Santa Fe Ry. Co. v. Chicago* (C. A. 7th, 1957), 240 F. 2d 930, 936, 1. col., hdn. 1, ftn. 14, aff'd 357 U. S. 77, 2 L. ed. 2d 1174, 78 S. Ct. 1063.

[77] *Castle v. Hayes Freight Lines* (1953), 348 U. S. 61, 63, 1st par., ftn. 5, 99 L. ed. 68, 72, 1. col., 1st par., ftn. 5, 75 S. Ct. 191; *Interstate Busses Corp. v. Holyoke Street Ry. Co.* (1927), 273 U. S. 45, 51, 1st par., 71 L. ed. 530, 534, 1. col., 2d par., 47 S. Ct. 298; *People's Natural Gas Co. v. Pub. Ser. Com. of Pa.* (1926), 270 U. S. 550, 554, 1 par., 70 L. ed. 726, 730, 1. col., 2d par.; *Hi-Ball Transit Co. v. Railroad Com. of Texas* (D. C-N. D. Texas, 1928), 27 F. 2d 425, 527, hdn. 3; *Inter-City Coach Co. v. Atwood* (D. C.-D. R. I., 1927), 21 F. 2d 83, 84, r. col., hdn. 1, app. dism. 278 U. S. 663, 73 L. ed. 569, 49 S. Ct. 78; *Clark v. Pub. Ser. Com. of Md.* (Md. 1956), 120 A. 2d 363, 367, r. col., hdn. 1; *Hazelton v. Interstate Stage Lines* (1926), 133 A. 451, 456, 1. col., hdn. 9, 82 N. H. 327, 47 A. L. R. 218, 224, r. col., 2d par.; *Atlantic Freight Lines v. Pa. Pub. Utility Com.* (1948), 60 A. 2d 589, 592, r. col., hdn. 6, 593, r. col., 163 Pa. Super. 215; *Ryan v. Pa. Pub. Utility Com.* (1941), 17 A. 2d 637, 640, r. col., hdn. 4, 143 Pa. Super. 517, cert. den. 314 U. S. 640, 86 L. ed. 514, 62 S. Ct. 80; *Atlantic Freight Lines v. Pa. Public Utility Com.* (1948), 163 Pa. Super. 215, 60 A. 2d 589, 593, 1. col.; *Humble Oil & Refining Co. v. Texas & Pacific Ry. Co.* (1955), 280 S. W. 2d 547, 155 Tex. 483; *All American Bus Lines v. Hawkins* (Tex. 1945), 188 S. W. 2d 992, 997, r. col., hdn. 3; *Service Storage & Transf. Co. v. Virginia* (1958), 102 S. E. 2d 339, 199 Va. 797, rev'd on other grounds, 359 U. S. 171, 3 L. ed. 2d 717, 79 S. Ct. 714; *Baltimore & Ohio Rail-*

illustrated by *Eichholz v. Public Service Commission of Missouri*[78] wherein the Supreme Court, speaking through Mr. Chief Justice Hughes, stated as follows:[79]

> Appellant did not seek from the state commission a certificate entitling him to do an intrastate business. Under the Commission's rule, he had his choice either to refrain from carrying property between points in Missouri or to secure a certificate of public convenience and necessity as an intrastate carrier. The validity of the requirement of such a certificate to promote the proper and safe use of the state highways is not open to question. *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 S. Ct. 140; *Morris v. Duby*, 274 U. S. 135, 143, 71 L. ed. 966, 971, 47 S. Ct. 548; *Clark v. Poor*, 274 U. S. 554, 556, 557, 71 L. ed. 1199-1201, 47 S. Ct. 702; *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 189, 82 L. ed. 734, 741, 58 S. Ct. 510; compare *Buck v. Kuykendall*, 267 U. S. 307, 315, 69 L. ed. 623, 626, 45 S. Ct. 324, 38 A. L. R. 286; *Interstate Busses Corp. v. Holyoke Street R. Co.*, 273 U. S. 45, 51, 71 L. ed. 530, 534, 47 S. Ct. 298; *Sprout v. South Bend*, 277 U. S. 163, 169, 72 L. ed. 833, 836, 48 S. Ct. 502, 62 A. L. R. 45.
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> Rule 44 was plainly designed to provide a safeguard against the use of an interstate permit to circumvent the requirement of a certificate for intrastate traffic. The rule simply sought to hold to his

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road Co. v. Pub. Ser. Com. (1917), 94 S. E. 545, 81 W. Va. 457, P. U. R. 1918B, 608, 612, 2d par. See also: *Smith v. Ill. Bell Teleph. Co.* (1930), 282 U. S. 133, 148, 2d par., 75 L. ed. 255, 263, 1. col., hdn. 3, 51 S. Ct. 65; Re New Jersey Bell Telephone Co. (N. J. Bd. of Pub. Utility Com'rs, 1947), 72 P. U. R., N. S. 37 (1), 47 (1).

[78] (1939), 306 U. S. 268, 83 L. ed. 641, 59 S. Ct. 532.

[79] id. U. S. 273, 3d par., L. ed. 645, r. col., hdn. 3.

choice the one who had sought and obtained a permit exclusively for interstate transportation. Appellant was entirely free to conduct that transportation if he did not engage in the intrastate business for which he had deliberately refrained from qualifying himself. We cannot see that the rule on its face imposed any improper burden upon interstate commerce and the question is whether it did so through the application that the Commission has made of it.

Since the enactment of the Federal Motor Carrier Act, the Courts and Commissions have uniformly held that interstate motor carriers cannot lawfully transport passengers or goods between intrastate points without first obtaining a certificate of convenience and necessity from the State commission involved, and that the rates of such intrastate commerce are regulated by the State commission.[80] These cases are consistent with those decided prior to the effectiveness of the Federal Motor Carrier Act.[81]

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[80] *Clark v. Md. Pub. Ser. Com.* (1956), 120 A. 2d 363, 367 (1), 209 Md. 121; *All American Bus Lines, Inc. v. Hankins* (Tex. Civ. App. 1945), 188 S. W. 2d 992, 993 (1); *Hudson Bus Transp. Co., Inc. v. N. J. Bd. of Pub. Utility Com'rs* (1944), 37 A. 2d 636, 638 (6), 131 N. J. L. 576; *Nev. Pub. Ser. Com. v. Eighth Judicial Dist. Ct.* (1942), 123 P. 2d 237, 61 Nev. 245; *Tips v. Railroad Com. of Texas* (Tex. Civ. App. 1937), 110 S. W. 2d 585, 586 (4); *Re Oriole Motor Coach Lines, Inc.* (Md. Pub. Ser. Com. 1951), 89 P. U. R., N. S. 480, (1), 481, r. col., 1st par.; *Re Capital Transit Co.* (Md. Pub. Serv. Com. 1948), 74 P. U. R., N. S. 319 (1), 323 (1); *Re Railway Express Agency, Inc.* (Ohio Pub. Utilities Com. 1947), 71 P. U. R., N. S. 196 (10), 206, l. col. 2d par.; *Re Motor Terminals, Inc.* (Ohio Pub. Utilities Com. 1947), 70 P. U. R. N. S. 325 (10), 332 (10); *Re Joseph McEniry, dba Two Sioux Bus Line* (Iowa St. Commerce Com. 1946), 66 P. U. R., N. S. 154; *Re Urban J. Hake dba H. & W. Motor Express Co.* (Iowa St. Commerce Com. 1946), 63 P. U. R., N. S. 494 (3), 498, l. col., 2d par.; *Re Eastern Contract Haulers, Inc.* (Pa. Pub. Utility Com. 1939), 31 P. U. R., N. S. 395 (5), 402, r. col., 2d par.

[81] *Atlantic-Pacific Stages, Inc. v. Stahl* (D. C.-W. D. Mo. 1929), 36 F. 2d 260, 263 (9); *Hubert v. Pa. Pub. Ser. Com.* (1935), 180 A. 23; 25 (5), 118 Pa. Sup. 128; *Midwestern Motor Transit v. Ohio Pub. Utilities Com.* (1933), 185 N. E. 194, 195 (4), 126 Ohio

Probably, the most extreme application of the doctrine of separability is presented by judicial interpretations of Section 1 (b) of the National Gas Act[82] which provides as follows:

> 1 (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.* (Emphasis supplied.)

Obviously the exemption indicated by the above emphasized language is analogous to the exemptions contained in Section 202 (b) and the proviso of Section 216 (c) of the Interstate Commerce Act.

An illustrative interpretation of Section 1 (b) is afforded by *North Dakota v. FPC*[83] wherein the United

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St. 317 (3); *Canton-East Liverpool Coach Co. v. Ohio Pub. Utilities Com.* (1930), 174 N. E. 244, 123 Ohio St. 127; *In re Sioux Falls Traction System* (1929), 228 N. W. 179, 56 S. D. 207; *Detroit-Cincinnati Coach Line, Inc. v. Ohio Pub. Utilities Com.* (1928), 164 N. E. 356, 119 Ohio St. 324; *State v. Le Febvre* (1928), 219 N. W. 167, 169 (1), 174 Minn. 248; *Hazelton v. Interstate Stage Lines* (1926), 133 A. 451, 456 (9), 82 N. H. 327; *Pa. Railroad Co. v. Colonial Stages* (Pa. Pub. Ser. Com. 1930), P. U. R. 1930B, 244; *Scioto Valley Railway & Power Co. v. Interstate Motor Transit Co.* (Ohio Pub. Utilities Com. 1927), P. U. R. 1927D, 720 (3), 724, 1 par.; *Re E. W. Bennett* (Mont. Bd. of R. Com'rs, 1927), P. U. R. 1927C, 595 (1), 596 (1); *Re E. H. Scott Transportation Co.* (Pa. Pub. Ser. Com. 1925), P. U. R. 1925D, 529 (2), 530 (2); and *Re Brewster-Danbury Motor Bus, Inc.* (N. Y. Pub. Ser. Com. 1925), P. U. R. 1925D, 307, 310, 1 par.

[82] 14 U. S. C., Sec. 717 (b), 52 Stat. 821 (1938).

[83] (C. A. 8th, 1957), 247 F. 2d 173.

States Court of Appeals for the Eighth Circuit opined as follows:[84]

> Our question is—referring only to the Tioga-Williston lateral distributions—does natural gas produced, wholesaled, transported, and sold for immediate consumption solely within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce, the purchase contracts for such gas distributed within the state having been executed with each supplier one day prior to execution of the corresponding interstate "dump gas", contracts?

The Examiner's answer to the question, which was approved by the FPC, was:

> "At the outset it should be noted that this Commission clearly has no jurisdiction over the sales made by Signal and Amerada under the 16¢ 'firm gas' contracts. Under Section 1 (b) of the Natural Gas Act this Commission has jurisdiction only over the transportation of natural gas in interstate commerce, or the sale in interstate commerce of natural gas for resale. It has no authority to regulate *intrastate* sales. The gas sold under the instant 16¢ contracts is admittedly produced and consumed wholly within the State of North Dakota, both in the communities served from the Tioga-Minot line and in the communities served from the Tioga-Williston line. The conclusion that they are accordingly *intrastate* contracts is so obvious as to require no extended discussion. The fact that this gas travels over the Tioga-Williston line in one stream, along with the gas purchased under the 9¢

[84] Id. 176, 1. col., 2d par.

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'dump gas' interstate contracts does not convert the 16¢ 'firm gas' contracts into interstate contracts."

We think the Examiner was eminently correct.

The Natural Gas Act, 15 U. S. C. A., § 717, et seq., is of course concerned only with the transportation and sale of natural gas in interstate and foreign commerce. 15 U. S. C. A., § 717 (a), declares:

"* * * that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

717 (b) states:

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.*" (Emphasis supplied.)

Interstate commerce is defined as follows (15 U. S. C. A., § 717a, Definitions):

"(7) 'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

That the Act does not embrace intrastate commerce is clear from the Act itself and from judicial interpretations

thereof. *Colorado Interstate Gas Co. v. Federal Power Commission*, 10 Cir., 1944, 142 F. 2d 943, 958, affirmed in *Colorado Interstate Gas Co. v. Federal Power Commission*, 1945, 324 U. S. 581, 585, 588, 65 S. Ct. 829, 89 L. Ed. 1206; *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 1947, 332 U. S. 507, 516, 517, 68 S. Ct. 190, 92 L. Ed. 128; *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 1951, 341 U. S. 329, 334, 71 S. Ct. 777, 95 L. Ed. 993. See *State Corp. Commission of Kansas v. Federal Power Commission*, 8 Cir., 1953, 206 F. 2d 690, 707, certiorari denied 346 U. S. 922, 74 S. Ct. 307, 98 L. Ed. 416.

That gas pipeline companies can be engaged in both intrastate as well as interstate business and have the intrastate portion not subject to FPC jurisdiction is illustrated by *Colorado Interstate Gas Co. v. Federal Power Commission*, 1945, 324 U. S. 581, 585, 65 S. Ct. 839, 89 L. Ed. 1206. Petitioners argue, however, that the four contracts, two for "dump gas" and two for "firm gas," were interdependent, that "the natural gas delivered in one stream at the discharge point, pursuant to these interdependent contractual instruments, is then transported in indistinguishable quantities southwestward along the Tioga to Williston interstate line," and that they are therefore subject to FPC jurisdiction. As found by the Examiner and approved by the FPC, the gas received by Montana-Dakota at Tioga, North Dakota, is broken into two streams one of which moves eastward in the Tioga-Minot, North Dakota, intrastate line. Clearly that is and can only be intrastate transportation not subject to FPC control. The other stream moves westward but before crossing any state line a small portion of it goes off into the laterals serving the four North Dakota towns of Ray, Wheelock, Epping and Springbrook. The gas going into the Tioga-Minot intrastate line and to the four named North Dakota towns is bought and paid for under the "firm gas" contracts.

We think, then, the gas sold pursuant to such "firm gas" contracts for consumption in North Dakota is clearly distinguishable from the "dump gas" sold in interstate commerce. There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota. Accordingly the quantities of intrastate gas purchased by Montana-Dakota under the "firm gas" contracts are easily identifiable and determinable.

We should also note the ratio decidendi of *People's Natural Gas Co. v. Public Ser. Com. of Pa.*[85] wherein the High Court, speaking through Mr. Justice Van Devanter, stated as follows:[86]

> As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So, for all practical purposes the two are separable, and neither affects the character of the business as to the other. *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265, 66 L. ed. 227, 42 Sup. Ct. Rep. 101; *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277, 281, 66 L. ed. 234, 239, 42 Sup. Ct. Rep. 105. And see *Hallanan v. Eureka Pipe Line Co.*, 261 U. S. 393, 67 L. ed. 715, 43 Sup. Ct. Rep. 414; *Hallanan v. United Fuel Gas*

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[85] (1926), 270 U. S. 550, 70 L. ed. 726.

[86] id. U. S. 554, 1 par., L. ed. 730, 1. col., 2d par.

Co., 261 U. S. 398, 67 L. ed. 718, 43 Sup. Ct. Rep. 416.[87]

The natural gas cases provide a powerful analogy supporting the Third Premise. Obviously, the injection of intra- and interstate gas into the same pipeline results in a homogeneous commingling whereby the character of each commodity loses its identity and becomes indistinguishable. On the other hand, the entry of a bus or terminal by intra- and interstate passengers does not result in an indistinguishable commingling. Each passenger of course retains his identity. A fortiori, if the doctrine of separability is applied to indistinguishable commodities it should also be applied to passengers.

Manifestly, the authorities referred to in our consideration of the Third Premise reveal that passengers traveling in intrastate commerce are not deprived of their identity for regulatory purposes by commingling with passengers traveling in interstate commerce.

B.

The Fallacy of the Opinion Below.

The District Court in reliance upon *Southern*[88] and *McComb*[89] held that the ICC Order merely regulated the instrumentalities of interstate commerce and that any effect on intrastate passengers or local patrons of terminals was indirect and incidental. *Southern* upheld Federal

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[87] See also *Colorado Interstate Co. v. F. P. C.* (1945), 324 U. S. 581, 585, 1 par., 89 L. ed. 1206, 1214, 1 col., 2d par., 65 S. Ct. 829.

[88] *Southern Railway Company v. U. S.* (1911), 222 U. S. 20, 56 L. ed. 72.

[89] *Morris v. McComb* (1947), 332 U. S. 422, 92 L. ed. 44

regulation requiring that all locomotives, cars and similar vehicles used on any railway engaged in interstate commerce be equipped with certain designated safety appliances, regardless of whether such vehicles are used in moving intrastate or interstate traffic. *McComb* concerned the Federal regulation of overtime pay requirements of truck drivers and maintenance employees of a cartage company engaged indiscriminately in the transportation of goods in inter- and intrastate commerce. In each case, the object of regulation was an instrumentality of interstate commerce which was physically inseparable for regulatory purposes and, therefore, the Federal regulation in *Southern* and the Federal Motor Carrier Act in application in *McComb* predominated.

By contrast, the ICC Order in this case is in substance and effect a direct regulation of the passengers and local patrons utilizing the instrumentalities of interstate commerce. The scope of the ICC Order is coextensive with those persons having a contract or nexus with an interstate instrumentality. The object of the ICC Order is the elimination of racial segregation among those persons having a nexus with an interstate motor carrier or terminal. In *Brown v. Board of Education of Topeka*,[90] this Court invalidated State laws requiring racial segregation in schools and in so doing stated that: "To separate them (Negroes) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[91] The motivation for Brown was the recognition of intangible human values which are meaningless when applied directly to inanimate objects such as

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[90] (1954), 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686, 38 A. L. R. 2d 1180.

[91] id., 347 U. S. 494, 1st par., 98 L. ed. 880, r. col., 2d par.

buses or terminals. Obviously, the ICC Order regulates persons, not inanimate objects. And it is agreed by the parties that a substantial number of these persons are intrastate passengers and local patrons of terminals.

As we have seen previously, the commingling of inter- and intrastate passengers within interstate instrumentalities does not emasculate the identity of the intrastate passengers for regulatory purposes. By contrast, the objects of regulation in *Southern* and *McComb* were inseparable for regulatory purposes. This distinction renders *Southern* and *McComb* unanalogous to the factual pattern of this case and, hence, demonstrates the erroneousness of the District Court's opinion.

This same distinction is also implicit in a consideration of *Southern* and *Shreveport* as evidenced by the following statement:[92]

> It may be asked, why may not Congress regulate intrastate rates, if it may require, as the Supreme Court has decided,[93] the use of safety appliances on purely intrastate trains? The reason is that while interstate and intrastate rates may be interdependent for economic or geographical reasons, this is not the same direct interdependence that necessarily exists between trains or cars operated over the same tracks. A rate is a charge for, not an instrument of transportation. Of course, physical interdependence is not *per se* the one and only criterion by which we determine whether or not the necessity for uniformity is real or potential, but th much we must find, namely, that the exercise of state authority, whether it be

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[92] 28 Harvard Law Review 34, at page 69, 2d par.

[93] *Southern Railway Co. v. United States*, 222 U. S. 20 (1911) See also *Southern Railway Co. v. Crockett*, 234 U. S. 725.

regulatory of rates, hours of labor, employers' liability, the equipment or inspection of rolling stock, or what not, necessarily impinges upon and burdens in a relatively immediate way the full exercise of federal authority. We do so find in the case of safety appliances, because of the direct connection between the equipment used in the two kinds of traffic. There is an inseparable interdependence of the very objects of the legislation.[94] But the court did not, nor can it find the same relation between interstate and intrastate rates. Why then, if these two classes of rates are separable, should the court say that the action or non-action of Congress is the controlling factor? If these two classes of rates are separable, the power of the state over the intrastate rates must be plenary and exclusive, not servient, unless we do violence to the very words of the Constitution and to that long line of decisions, beginning with *Gibbons v. Ogden*, which have just been analyzed.

The decision in *Southern Railway Co. v. United States*, the safety-appliance case, just referred to, clarifies, when properly analyzed, the distinction which, it is believed, underlies the Minnesota Cases. In every case cited by the Supreme Court to prove the principle that the plenary nature of the state's power depended upon the non-action of Congress, *the legislation in question operated directly upon the instrumentalities of interstate commerce or upon the very subject-matter of interstate commerce itself.* Herein lies the distinguishing feature which the court seems disposed to overlook. The character of the

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[94] A somewhat kindred situation arose in the car distribution cases. See *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452 (1910); *Baltimore & Ohio R. R. Co.*, ex rel., *v. Pitcairn Coal Co.*, 215 U. S. 481 (1910); *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 U. S. 304 (1913).

legislation clearly shows this: pilotage regulations, protection and improvement of navigable waters, regulation of wharfage charges or tolls, quarantine regulations, inspection laws, laws governing non-feasance or misfeasance of interstate carriers. These involve no question of regulation by a state of a purely internal matter, but rather the regulation by a state of matters on their face interstate, and therefore governed, as we have seen, by the principle of concurrent powers. It was over these very matters that the controversy, out of which finally emerged the principle of concurrent powers, was waged for many years, and the whole basis of the controversy was the fact that these matters were *interstate*.

In *Shreveport* this Court advanced Federal power from the direct regulation of instrumentalities of interstate commerce to the direct regulation of the subjects of intrastate commerce when such subjects were found to burden interstate commerce. This advance in Federal power made *Shreveport* a momentous decision. Counsel for the United States admitted this distinction in oral argument before the District Court.[95]

The legislative history and the language of the Federal Motor Carrier Act clearly negate the applicability of the *Shreveport Doctrine* to Federal motor carrier regulation and the parties concur in such construction. Manifestly, the ICC Order attempts to directly regulate intrastate passengers and local patrons of interstate instrumentalities and, hence, the Order is null and void by virtue of transcending the authority delegated to the ICC by the Congress.

The Appellees also contended in the District Court that Georgia had no legitimate aim in contesting the ICC

[95] Record, p. 111.

Order, but only the desire to perpetuate racial segregation. This contention is also fallacious. No mandate of constitutional law is now so certain or clear as the mandate prohibiting government from sanctioning or practicing racial discrimination. This Court in a legion of cases has held that State action requiring racial segregation suffers a fatal conflict with the due process and equal protection clauses of the Fourteenth Amendment. Recently, all of Georgia's general laws requiring racial segregation on motor carriers have been invalidated by Federal Courts.[96] On February 26, 1962, this Court held unanimously that no State may require racial segregation of interstate or intrastate transportation facilities, and that, the constitutional issue presented by the case was essentially fictitious in view of earlier decisions, and that, therefore, no Three-Judge Court was required to hear the action.[97]

Furthermore, motor common carriers being public utilities are under a legal obligation to serve the public without arbitrary discrimination.[98] The Exhibit in this case reveals that on January 17, 1961, the Greyhound Corporation voluntarily issued an executive bulletin providing that no passenger should be seated nor asked to move because of his race, making no distinction between interstate and intrastate passengers.[99]

Manifestly, Georgia does not possess the power or the intention to require racial segregation.

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[96] See opinions reproduced in Appendixes E, F and G, infra, pp. 77, 79, 82, respectively.

[97] *Bailey v. Patterson* (1962), 369 U. S. 31, 7 L. ed. 2d 512.

[98] 73 C. J. S., Public Utilities, Sec. 6, p. 997, Sec. 7 (b), p. 999.

[99] Respondents' Exhibit No. 1, p. 18, 7th par.; Record, p. 44, 1 par.

The ICC Order is predicated on a novel nexus theory which seeks to justify ICC regulation of all persons having contact with an interstate instrumentality. The nexus theory is actually more sinister to State power than the burden theory established by *Shreveport*. Under the burden theory, the ICC must at least find an undue burden on interstate commerce, whereas, under its new imaginative theory the ICC merely finds a nexus with an interstate instrumentality. In other words, under this pseudo concept of regulation the ICC may regulate any passengers or goods in infrastate commerce having a nexus with an instrumentality of interstate commerce.

With equal justification, the ICC could next week adopt an order stating that "No motor common carrier of passengers or goods subject to Section 216 of the Interstate Commerce Act shall operate a motor vehicle in interstate or foreign commerce on which rates for transportation are charged which are disproportionate to those prescribed by the Interstate Commerce Commission." The effect of such an order would be to eliminate State regulation of rates for the transportation of the subjects of infrastate commerce by interstate motor carriers. Or, the ICC could issue an order stating that "No motor common carrier of passengers or goods subject to Section 216 of the Interstate Commerce Act shall operate a motor vehicle in interstate or foreign commerce and refuse to transport thereon any passengers or goods when such motor vehicle possesses available capacity for such transportation." The effect of such an order would be to eliminate State regulation of intrastate business conducted by an interstate motor carrier, through the issuance or refusal of State certificates of public convenience and necessity. The purpose of these certificates is to prevent an excessive number of carriers from operating over the same route thereby prohibiting competition from being

extended to an extreme which tends to undermine the financial stability of the motor carriers and jeopardize the maintenance of transportation facilities and services appropriate to the needs of commerce and required in the public interest.

If the ICC has the power to enforce the Order in question, it has by the same token the power to eliminate the rate-making and certification power of the States over intrastate commerce conducted by interstate instrumentalities. There is no distinction in law or logic.

The ICC under the banner of a popular cause has invaded an area forbidden to it by the Congress. And in this invasion there will be no voluntary retreat, but only the desire for further conquest at the expense of State power vouchsafed by the Congress.

To characterize the ICC Order as a regulation of interstate instrumentalities is a fiction. The contended justification of the Order is predicated upon the intangibles of the human heart and mind, and it is aimed not at inanimate objects, but directly at the human subjects of commerce. The interstate instrumentalities merely serve to delimit by contact the boundaries of illicit agency conquest.

In the Federal Motor Carrier Act, Congress has struck a balance between Federal and State power. Any alteration in such balance addresses itself to the Congress and not to the Courts. This case presents pivotal questions of nationwide importance. We must recognize that not only the interests of Georgia are involved here, but also the interests of the other forty-nine States and the District of Columbia as well. The national regulatory pattern of motor carriers produced by the Federal-State relationship is in this case placed in jeopardy. The admission of the ICC into the regulation of such intrastate commerce will herald the demise of effective and vital State regulation.

VI.

CONCLUSION.

The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, and, hence, this Court should enter an order noting probable jurisdiction.

Respectfully submitted,

EUGENE COOK,
The Attorney General,

PAUL RODGERS,
Assistant Attorney General,
Counsel for Appellants.

P. O. Address:
132 Judicial Building,
40 Capitol Square,
Atlanta 3, Georgia.

May, 1962.

APPENDIX A.

In the
UNITED STATES DISTRICT COURT,
Northern District of Georgia,
Atlanta Division.

State of Georgia and The Public Service Commission of the State of Georgia,
Plaintiffs,
versus
United States of America and Interstate Commerce Commission,
Defendants.

C. A. No. 7758.

This suit was filed by the State of Georgia and the Public Service Commission of the State of Georgia under the provisions of Title 28, U. S. C. A., §§ 1336, 1398, 2284, and 2321 through 2325, seeking to enjoin, annul and set aside the order of the Interstate Commerce Commission of the United States, entered September 22, 1961, in the proceeding known as *Discrimination in Operations of Interstate Motor Carriers of Passengers*, Docket No. MC-C-335. The parts of the specified order that are attacked by the State of Georgia are as follows:

180a (1) *Discrimination prohibited.* No motor common carrier of passengers subject to section 216 of the Interstate Commerce Act shall operate a motor vehicle in Interstate or foreign commerce on which the seating of passengers is based upon race, color, creed, or national origin.

180a (4) *Discrimination in terminal facilities.* No motor common carrier of passengers subject to section 216 of the Interstate Commerce Act shall in the operation of vehicles in interstate or foreign commerce provide, maintain arrangements for, utilize, make available, adhere to any understanding for the availability of, or follow any practice which includes the availability of, any terminal facilities which are so operated, arranged, or maintained as to involve any separation of any portion thereof, or in the use thereof on the basis of race, color, creed, or national origin.

The State's principal attack on the validity of the Interstate Commerce Commission order is based upon Section 202 (b) of the Interstate Commerce Act, 49 U. S. C. A., § 302 (b), which provides as follows:

(b) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to *interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.* (Emphasis added.)

The State also contends that the Interstate Commerce Commission lacks the power to issue an order having general application against carriers certificated by it to implement the provisions of Section 216 (d) of the Interstate Commerce Act, 49 U. S. C. A. 316 (d), on the theory that Section 216 (d) (the anti-discrimination section of the Act) is self-executing and may not be implemented by orders of the Commission.

The State further contends that even though general implementing orders should be held proper to implement Section 216 (d), nevertheless the Commission failed to

follow the procedural steps required before issuing the particular order here involved.

Finally, the State contends that there is no sufficient factual basis for the finding by the Commission of the need for the challenged order since no showing was made that any particular carrier in any particular part of the United States was actually violating the anti-discrimination terms of Section 216 (d) of the Act.

It is the thrust of the State's contention that the effect of the order, which on its face purports to prohibit the use of interstate instrumentalities, if they are operated on a racially segregated basis, is to regulate intrastate commerce. This, the State says, results from the fact that economic necessity dictates that the same vehicles and terminal facilities be used in both interstate and intrastate transportation.

It seems that there can be no longer any doubt but that the Interstate Commerce Commission has full power over the regulation of both vehicles and facilities of common carriers engaged in interstate commerce. See *Southern Railway Co. v. United States*, 222 U. S. 20; *Morris v. McComb*, 332 U. S. 422. In view of the fact that the present order deals expressly with vehicles when used in interstate commerce and terminal facilities when used in interstate commerce, it seems to follow that this is an order regulating vehicles and facilities of interstate commerce rather than, as the State contends, the subject matter of intrastate commerce. We hold that to the extent that such regulation of interstate vehicles and facilities affects strictly intrastate matters, this effect is incidental. Such effect as may follow from the economic necessities touching on the operation of the motor carrier industry can not, we think, prevent the exercise by the Interstate Commerce

Commission of its recognized right to regulate interstate commerce. Of course, nothing in the order and nothing here decided by us touches in any way the power of the Georgia Public Service Commission to regulate purely intrastate motor carrier transportation in any manner that has heretofore been legally open to it.

Touching on the second contention of the State, we believe that the Interstate Commerce Commission has the power to implement Section 216 (d) by the issuance of a general order in the manner which was done in this case. See *Assigned Car Cases*, 274 U. S. 564; *A. T. A. v. United States*, 344 U. S. 298; and *S. E. C. v. Chenery Corp.*, 318 U. S. 80, and 332 U. S. 194.

We find no basis for the State's contention that procedurally the Interstate Commerce Commission lacked power to issue the order complained of. Moreover, we find that the record of the proceedings before the Commission adequately supports the findings of the Commission to the effect that the policy of requiring racial segregation in the facilities used for interstate commerce has been practiced on such a regular basis that "case by case action initiated by individual complaints under Section 216 (e), standing alone, is not an adequate remedy." The existence of statutes in many states expressly requiring segregation by race in these facilities, of which of course the Commission and this Court takes judicial notice, would be an adequate basis for the Commission's finding to this effect.

We conclude, therefore, that the order of the Interstate Commerce Commission may not be set aside for any of the reasons asserted in this suit. We hold, therefore, that the order entered by the Interstate Commerce Commission in Docket MC-C-3358 is a valid and binding order of the

Interstate Commerce Commission. The prayer for injunction and other relief, therefore, must be DENIED.

This 19th day of December, 1961.

Elbert P. Tuttle,
Elbert P. Tuttle,
United States Circuit Judge.

Frank A. Hooper,
Frank A. Hooper,
United States District Judge,

Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

APPENDIX B.

Title 49—Transportation.

Chapter I—Interstate Commerce Commission.

Subchapter B—Carriers by Motor Vehicle.

Part 180a—Regulations Governing Discrimination in Operations of Interstate Motor Common Carriers of Passengers.

No. MC-C-3358.

Discrimination in Operations of Interstate Motor Carriers of Passengers.

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 22nd day of September, A. D. 1961.

It appearing, That upon consideration of a petition, filed May 29, 1961, by the Attorney General of the United States, on behalf of the United States, and for good cause shown, the Commission, by notice and order entered June 19, 1961, instituted the above-entitled proceeding under Part II of the Interstate Commerce Act (more specifically including sections 204 (a) (6), 204 (c), 216, and 220 of the said act) and section 4 of the Administrative Procedure Act to determine the lawfulness of certain regulations proposed by the petitioner designed to eliminate discrimination on the basis of race, color, creed, or national origin, in the operations of interstate motor carriers of passengers, and to determine further whether the facts and circumstances require or warrant the making of the proposed regulations or other regulations of similar purport applicable to motor common carriers of passengers operating in interstate or

foreign commerce subject to the Interstate Commerce Act, and for the purpose of taking such other and further action as the facts and circumstances may justify or require;

It further appearing, That the said notice and order entered June 19, 1961, made all motor common carriers of passengers operating in interstate or foreign commerce within the United States and subject to the Interstate Commerce Act respondents in this proceeding; that a copy of the said notice and order was served on all respondents and that notice to other interested persons was given through publication of the said notice in the Federal Register (26 F. R. 5530);

And it further appearing, That the Commission, on the date hereof, has made and filed its report on oral argument herein setting forth the basis for its conclusions and its findings with respect to the said petition, which report is hereby referred to and made a part hereof, and good cause appearing therefor:

It is ordered, That 49 C. F. R. be, and it is hereby, amended by adding thereto Part 180a as follows:

180a Regulations Governing Discrimination in Operations of Interstate Motor Common Carriers of Passengers.

Sec. 1—Discrimination prohibited.

Sec. 2—Sign to be posted in vehicles.

Sec. 3—Notice to be printed on tickets.

Sec. 4—Discrimination in terminal facilities.

Sec. 5—Notice to be posted at terminal facilities.

Sec. 6—Carriers not relieved of existing obligations.

Sec. 7—Reports of interference with regulations.

Sec. 10—Definitions.

180a (1) *Discrimination prohibited.* No motor common carrier of passengers subject to section 216 of the Interstate Commerce Act shall operate a motor vehicle in interstate or foreign commerce on which the seating of passengers is based upon race, color, creed, or national origin.

180a (2) *Sign to be posted in vehicles.* Every motor common carrier of passengers subject to section 216 of the Interstate Commerce Act shall conspicuously display and maintain, in all vehicles operated by it in interstate or foreign commerce, a plainly legible sign or placard containing the statement: "Seating aboard this vehicle is without regard to race, color, creed, or national origin, by order of the Interstate Commerce Commission." This section (49 C. F. R. 180a (2)) shall cease to be effective on January 1, 1963, unless such time be further extended by the Interstate Commerce Commission.

180a (3) *Notice to be printed on tickets.* Every motor common carrier of passengers subject to section 216 of the Interstate Commerce Act shall cause to be printed on every ticket sold by it for transportation on any vehicle operated in interstate or foreign commerce a plainly legible notice as follows: "Seating aboard vehicles operated in interstate, or foreign commerce is without regard to race, color, creed, or national origin." This section (49 C. F. R. 180a (3)) shall be applicable to all tickets sold on or after January 1, 1963.

180a (4) *Discrimination in terminal facilities.* No motor common carrier of passengers subject to section 216 of the Interstate Commerce Act shall in the operation of vehicles in interstate or foreign commerce provide, maintain arrangements for, utilize, make available, adhere to any understanding for the availability of, or follow any practice which includes the availability of, any terminal facilities which are so operated, arranged, or maintained

as to involve any separation of any portion thereof, or in the use thereof on the basis of race, color, creed, or national origin.

180a (5) *Notice to be posted at terminal facilities.* No motor common carrier of passengers subject to section 216 of the Interstate Commerce Act shall in the operation of vehicles in interstate or foreign commerce utilize any terminal facility in which there is not conspicuously displayed and maintained so as to be readily visible to the public a plainly legible sign or placard containing the full text of these regulations. Such sign or placard shall be captioned: "Public Notice: Regulations Applicable to Vehicles and Terminal Facilities of Interstate Motor Common Carriers of Passengers, by order of the Interstate Commerce Commission."

180a (6) *Carriers not relieved of existing obligations.* Nothing in this regulation shall be construed to relieve any interstate motor common carrier of passengers subject to section 216 of the Interstate Commerce Act of any of its obligations under the Interstate Commerce Act or its certificate(s) of public convenience and necessity.

180a (7) *Reports of interference with regulations.* Every motor common carrier of passengers subject to section 216 of the Interstate Commerce Act operating vehicles in interstate or foreign commerce shall report to the Secretary of the Interstate Commerce Commission, within fifteen (15) days of its occurrence, any interference by any person, municipality, county, parish, state, or body politic with its observance of the requirements of these regulations. Such report shall include a statement of the action that such carrier may have taken to eliminate any such interference.

180 (a) (10) *Definitions.* For the purpose of these regulations the following terms and phrases are defined:

(a) *Terminal facilities.* As used in these regulations the term "terminal facilities" means all facilities, including waiting room, rest room, eating, drinking, and ticket sales facilities which a motor common carrier makes available to passengers of a motor vehicle operated in interstate or foreign commerce as a regular part of their transportation.

(b) *Separation.* As used in section 4 of these regulations (49 C. F. R. 180a (4)), the term "separation" includes, among other things, the display of any sign indicating that any portion of the terminal facilities are separated, allocated, restricted, provided, available, used, or otherwise distinguished on the basis of race, color, creed, or national origin.

[52 Stat. 1237, 49 U. S. C., § 304 (a) (6)]

It is further ordered, That this order shall become effective November 1, 1961, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the office of the Secretary of the Commission at Washington, D. C., and by filing a copy with the Director, Office of the Federal Register.

By the Commission.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX C.

The following Sections are extracts from the Code of Georgia of 1933:

68-614. No discrimination in rates, service, etc.—No motor common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of passengers and property or for any service rendered in connection therewith than the rates, fares and charges prescribed or approved by order of the Commission; nor shall any motor common carrier unjustly discriminate against any person in its rates, fares, or charges for service, but the Commission may prescribe by general order to what persons motor common carriers may issue passes or free transportation, and may prescribe upon the same terms and conditions as now apply to railroad carriers reduced rates for special occasions; and may fix and prescribe rules and schedules (Acts 1931, pp. 199, 204).

68-621. Complaints to Commission; review of orders.—In all respects in which the Commission has power and authority under this Chapter, proceedings may be instituted, complaints made and filed with it, process issued, hearings held, opinions, orders, and decisions made and filed; and any final order may be reviewed in any court of competent jurisdiction under the conditions and subject to the limitations prescribed by law as relates to the Public Service Commission. (Acts 1931, pp. 199, 206.)

68-629. Rules of Commission.—The Commission is hereby authorized to adopt such rules and orders as it may deem necessary in the enforcement of the provisions of this Chapter. Such rules and orders so approved by the Commission shall have the same dignity and standing as if such rules and orders were spe-

cifically provided in this Chapter. (Acts 1931, pp. 199, 219.)

93-307. (2663) Jurisdiction of Commission.—The Public Service Commission shall have the general supervision of all common carriers, railroads, express corporations or companies, street railroads, railroad corporations or companies, dock or wharfage corporations or companies, terminal or terminal station corporations or companies, telephone and telegraph corporations or companies within this State, gas or electric light and power companies within this State; and while it may hear complaints, yet the Commission is authorized to perform the duties imposed upon it of its own initiative, and to require all common carriers and other public service companies under its supervision to establish and maintain such public service and facilities as may be reasonable and just, either by general rules or by special orders in particular cases, and to require such publication by common carriers, in newspapers of towns through which their lines extend, of their schedules as may be reasonable and which the public convenience demands. . . . (Acts 1907, pp. 72, 75; 1922, pp. 143, 144.)

The following Rules are extracts from the General Motor Carrier Rules and Regulations of the Georgia Public Service Commission:

CLASSIFICATION OF CARRIERS.

Rule 2.

Motor carriers operating under the motor carrier Acts will be classified as follows:

Class "A"—Common carriers of passengers and/or property operating over a fixed route or between fixed termini in intrastate, or intrastate and interstate commerce, under Certificates of Public Convenience and Necessity.

Class "B"—Common carriers of passengers and/or property operating over the highways of the State of Georgia but over no fixed route, in intrastate, or intrastate and interstate commerce, under Certificates of Public Convenience and Necessity.

Class "C"—Common carriers of passengers and/or property operating over the highways of Georgia but over no fixed route, between contiguous municipalities or between points within an area comprising a municipality and the residential, commercial and industrial areas adjacent to the city limits of a municipality or contiguous municipalities in intrastate, or intrastate and interstate commerce, under Certificates of Public Convenience and Necessity. . . .

RATES AND CHARGES.

Rule 5.

(a) No motor carrier operating under certificates Classes "A", "B" and "C" shall charge, demand, collect or receive a greater or less or different compensation for the transportation of passengers or property, or for any service rendered in connection therewith, than the rates, fares and charges prescribed or approved by order of the Commission; nor shall any motor carrier unjustly discriminate against any person in its rates, fares, charges or service, but the Commission will prescribe by general order to what persons motor carriers may issue passes or free transportation and reduced rates for special occasions. Nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares or charges prescribed or approved by the Commission or extend to any person, firm, co-partnership or corporation or other organization or association, privileges or facilities in the transportation of persons or property, except such as are regularly and uniformly extended to all. . . .

APPENDIX D.

Congressional Record, 74th Congress, First Session, April 16, 1935, Vol. 79, Pt. 5, pp. 5735-5737.

Mr. Duffy: Mr. President, I offer the amendment which I send to the desk.

The Vice President: The amendment will be stated.

The Chief Clerk: On page 3, after line 12, it is proposed to strike out down to line 5 on page 4 and in lieu thereof to insert the following:

(c) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State. It is not intended hereby to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof; and notwithstanding this part, the intrastate operations of motor carriers on the highways of a State shall continue to be subject to the laws of the State regulating such intrastate commerce: Provided, however, That the laws enacted in any State and regulations thereunder that relate to the maintenance, protection, safety, or use of the highways therein, which do not discriminate against motor vehicles used in interstate commerce, shall not be deemed to be a burden on or an obstruction or impediment to interstate commerce, and the power to enact such laws and promulgate such regulations thereunder is hereby expressly recognized and confirmed to the respective States: Provided further, That transportation of persons or property by motor vehicle between points in the same State through territory outside thereof by reason of

its local character is left subject to the regulation of the State within which such transportation takes place.

Mr. Duffy: Mr. President, the National Association of Railroad and Utility Commissioners is an organization which represents 46 of the State commissions, which largely have to do with the regulating of bus and motor-truck transportation. This proposed amendment was submitted by me at the request of the representatives of these various State regulatory bodies. The amendment was submitted to the Committee on Interstate Commerce, and I have before me the hearings of that committee.

I desire to quote here the opinion of this association as to what the wording of subsection (c) as now found in the bill would accomplish. It goes back to the old Shreveport Rate case, to the so-called "Shreveport doctrine"; and apparently it is the desire of the Interstate Commerce Commission to have the same broad powers over motor-truck transportation, even though it has to do with intrastate transportation, as they have with reference to the railroad rates. Irrespective of the fact that motor-truck transportation is, I understand, about 80 percent intrastate, nevertheless it is very clear to me, and is made clear from the quotation which I will make from the hearing, that the language of subsection (c) as now in the bill will give to the Interstate Commerce Commission over entirely intrastate motor transportation the same broad powers it now has as to railroad rates.

I quote from page 167 of the hearings. Mr. Benton, representing this association, was asked a question by the chairman of the committee, and he said in answer:

> Just exactly as it has now the right to regulate the intrastate rates that interstate railroad charge. There is no question, I think, with respect to that, Mr. Chairman. I will * * * point out the particular parts

of the act which will give the Interstate Commerce Commission power to regulate the intrastate rates under the Shreveport doctrine.

And at the bottom of the page:

It is because it will subject the intrastate rates not only of every interstate carrier who runs his bus or truck across the State line to the ultimate control of the Interstate Commerce Commission but it will subject the rates of every carrier who operates within the State, but not across the State lines, who carries any quantity of interstate merchandise, however small, to that regulation.

I agree with the contention of the members of the association of these various State commissions that since motor transportation and truck transportation are to a very large degree intrastate in character jurisdiction over them should not be taken away from the various State commissions.

I quote further from the hearings, at page 168:

That carrier, although he may not operate across any State line and may merely carry a very small quantity of interstate traffic, will be compelled to come to Washington to defend against that complaint.

I think that is another difference that should be borne in mind—that a small truck operator has not the facilities which the ordinary railroad company has, for instance, for coming here to Washington to defend himself or to appear before the Interstate Commerce Commission.

I have no personal interest whatsoever in the matter. It happens that the man in charge of the legislative committee of the association to which I have referred is a very valued member of the Wisconsin Public Service Commission, and I have a personal friendship with him, as a result of which he asked me to present on the floor of the

Senate the contention of the National Association of Railroad and Public Utility Commissioners. Since motor transportation differs so greatly from railroad transportation, I do not think there is any justification for subjecting these people, doing practically entirely an intrastate business, to the jurisdiction of the Interstate Commerce Commission.

I recognize the fact that the committee has been technically advised in these matters by the representatives of the Interstate Commerce Commission. Very likely they would like to have more power; and it would be, from their viewpoint, a proper thing.

I do not intend to take the time of the Senate any more than to present the viewpoint of the various State commissions which have been in the business of motor-truck regulation and understand that subject. I submit that this amendment should be adopted. It would reserve to the various State commissions the power they now have, and which clearly would be taken away under this bill if it should be passed in the language in which the committee has reported it to the Senate.

Mr. Wheeler: Mr. President, the amendment offered by the Senator from Wisconsin (Mr. Duffy) proposes to substitute the language submitted by him for the language on page 3, beginning with line 12, known as paragraph (c). The statement made by the Senator is hardly correct with reference to the present section of the bill giving to the Interstate Commerce Commission the same power with reference to trucks and busses that they now have over intrastate rates of railroads. This language does not go as far as that of section 13 (4) of the Interstate Commerce Act goes with reference to railroads. What it says is this:

> Nothing in this part shall be construed to affect the powers of taxation of the several States or to author-

ize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof, except where and only to the extent that such regulation causes undue or unreasonable disadvantage or prejudice to persons or localities in interstate commerce.

I may say that the Coordinator as a matter of fact, is not especially anxious about this particular clause. I myself rather favored the idea of leaving out of this bill the Shreveport doctrine; but the members of the committee, after hearing practically all those engaged in the truck- and bus-transportation business who were in favor of it, put in this language. I talked with Mr. Eastman about it, and Mr. Eastman himself feels that the language used in the bill should be included in it. It is not the idea of the Commission, and this paragraph does not give the power to regulate intrastate rates in general.

With reference to the idea of bringing the small shipper down here, as a matter of fact the Interstate Commerce Commission has suggested that the State commissions should be used in fixing the rates between the different States through use of the joint boards; so all the little shipper would have to do would be to appeal to these various boards rather than to come here to Washington.

Mr. Duffy: Mr. President, will the Senator yield at this point?

Mr. Wheeler: I yield.

Mr. Duffy: I note that the language which was originally in the bill is as follows:

> It is not intended hereby to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce.

The committee struck out the word "exclusive". It must have done that with a purpose, and it must have recognized when it did it that it would to a very considerable degree result in the regulation of rates as to intrastate commerce, or there would be no necessity of striking out the word "exclusive".

Mr. White: Mr. President, the purpose in striking out the word "exclusive" I think was to harmonize the section with the exception which appears at the bottom of the page.

Mr. Wheeler: And which was put in by the committee itself.

Mr. Gore: Mr. President——

The President pro tempore: Does the Senator from Montana yield to the Senator from Oklahoma?

Mr. Wheeler: I yield.

Mr. Gore: I desire to ask both the Senator from Montana and the Senator from Wisconsin whether striking out the clause beginning on line 23, page 3, with the word "except" would meet the objection raised by the Senator from Wisconsin.

Mr. Wheeler: I think that would meet the Senator's objection. I wish to point out, however, that his amendment goes further and might seriously conflict with and perhaps render ineffectual the definition of interstate commerce in the bill as set out in section 203. The amendment of the Senator from Wisconsin proposes to go further, and to say to the Commission, "You shall not have any power to regulate rates where a truck goes from a point in a State outside the State and back into the State."

What is happening with reference to that is this: It was testified by some of the members of State commissions and

some of the other witnesses before the committee that at the present time truck drivers, in order to get away from State regulation where they are located close to the border, will go outside of a State and then come back into the State, and claim that the State has no right to regulate them at all, because they are engaged in interstate commerce. The definition of interstate commerce found in the bill as drafted includes the constitutional definition of interstate commerce, and it seems to me that that cannot be changed.

Mr. Gore: I inquired whether striking out that clause would meet the main objection raised by the Senator from Wisconsin, because in the main I agree with him as to the object which he is seeking to accomplish, but I was not quite clear as to the scope of his amendment.

Mr. Wheeler: In my judgment the language of the amendment offered by the Senator from Wisconsin is somewhat unfortunate, because it covers several different matters, and it is my opinion that his amendment as worded would not only reach the Shreveport case but it might seriously hamper the Commission in fixing and regulating the hours of service, or it might seriously interfere with the safety provisions included in the bill at the present time. In my judgment, therefore, it would be unfortunate if the amendment should be adopted.

Mr. Gore: I do not wish to vest in the Interstate Commerce Commission the power to regulate transportation by trucks and busses between Oklahoma City and Tulsa—entirely within the State of Oklahoma, and purely intrastate commerce. I realize the doctrine laid down in the Shreveport case, and I am not certain that it would in any event have application to truck transportation; but I will ask the Senator from Wisconsin whether striking out that clause would practically meet his objection, and rid the bill of the danger to which he refers?

Mr. Duffy: I will say to the Senator from Oklahoma that I think the language was undoubtedly designed primarily to reach that situation, and I would have no objection to the suggestion made by the Senator from Oklahoma. I did, however, use in this amendment the language which was suggested by the National Association of Railroad and Public Utility Commissioners, who have made quite a study of the subject; and I really bowed to their judgment as to the scope of the wording, because I thought they knew more about it than I did.

Mr. Gore: I sympathize with their main objection and with that raised by the Senator from Wisconsin. I was wondering if the Senator would yield to me to enable me to move to strike out that clause. If that motion should fail, then the Senator could offer his amendment. Would that meet the objection?

Mr. Duffy: That would be agreeable, but perhaps the better way would be to vote on the amendment I have offered, and then have the Senator from Oklahoma offer his amendment in case mine should not prevail.

Mr. Gore: Very well. I thought possibly a motion to strike out the clause might be a little stronger than the amendment offered by the Senator from Wisconsin, but I yield to his suggestion.

Mr. Wheeler: Mr. President, I merely wish to say in conclusion that the amendment offered by the Senator from Wisconsin includes several different phases of the bill and I earnestly hope it will not be adopted.

The President Pro Tempore: The question is on agreeing to the amendment offered by the Senator from Wisconsin (Mr. Duffy).

On a division the amendment was rejected.

Mr. Gore: Mr. President, I move to strike out, on page 3, line 23, the clause beginning with the word "except." I think that meets the main objection raised by the Senator from Wisconsin (Mr. Duffy). I inferred that the Senator from Montana did not urge serious objection to its elimination, although I do not mean to commit the Senator.

I think the clause ought to be stricken out. I do not believe we ought to bring truck and bus transportation, which is entirely within a State, under the jurisdiction of the Interstate Commerce Commission on some sort of remote theory that it might directly or indirectly affect interstate commerce. If experience shall demonstrate the necessity of taking that further step, it can be taken in the future, but I believe for the present we ought to go more slowly and be guided by experience. Therefore I move to strike out that clause.

Mr. Wheeler: Mr. President, I myself have no particular objection. I rather took the view taken by the Senator from Oklahoma, but the majority of the committee took the other view. Mr. Eastman thought it was proper that this language should be in the law, but he had no particular objection to it being stricken out and stated that he was willing for the Commission to go ahead and attempt to carry out the law, even if that provision were not in it, and that if they found it was not satisfactory they could come back to Congress later and urge its inclusion.

The President Pro Tempore: The Chair understands the Senator from Oklahoma has moved to strike out all the rest of paragraph (c), on page 3, commencing with the word "except," down to the end of that subsection. Is that correct?

Mr. Gore: Yes; and to insert a period at the proper place.

The President Pro Tempore: The clerk will state the amendment.

The Chief Clerk: On page 3, line 23, it is proposed to strike out the words "except where and only to the extent that such regulation causes undue or unreasonable disadvantage or prejudice to persons or localities in interstate commerce against undue or unreasonable disadvantage or prejudice caused by any rate, fare, charge, classification, regulation or practice of motor carriers made or imposed by authority of any State."

The President Pro Tempore: The question is on agreeing to the amendment.

The amendment was agreed to.

APPENDIX E.

In the
UNITED STATES DISTRICT COURT
For the Northern District of Georgia,
Atlanta Division.

Reverend Samuel Williams and Reverend John T. Porter, Plaintiffs, vs. Georgia Public Service Commission et al.	}	Civil Action. No. 6067.

Order.

The above-entitled and numbered case having come on for trial by the court without a jury on the 9th day of January, 1959, and the plaintiffs having appeared by and through their attorneys, and the defendants having appeared by and through their attorneys, and the court, after having considered the pleading and heard the evidence, having duly made the findings of fact and conclusions of law in this cause, and on the basis thereof it is now

Ordered That:

(1) The following Ordinances of the City of Atlanta (Code 1953) are hereby declared unconstitutional and void as being violative of the Due Process and Equal Protection clauses of the 14th Amendment to the United States Constitution:

(a) Chapter 55, Section 55.91—*Segregation of Races* (Code 1942, Section 85.138).

(b) Chapter 55, Section 55.92—*Duty of Police in Connection With Preceding Section* (Code 1942, Section 85-139).

(2) The following Statutes of the State of Georgia (Georgia Code, 1933, as revised) are hereby declared unconstitutional and void as being violative of the Due Process and Equal Protection clauses of the 14th Amendment to the United States Constitution:

(a) Section 18-207—*Duty to Assign Passengers to Their Cars; Police Powers of Conductors.*

(b) Section 18-208—*Remaining in Seat, Compartment or Car Other Than to Which Assigned.*

(c) Section 18-9904—*Passenger Remaining in Car, Compartment or Seat Other Than That to Which Assigned.*

(3) The following statutes of the State of Georgia (Georgia Code, 1933, as Revised) are not applicable to the facts of this case and accordingly no relief is granted plaintiffs as to them: Section 68-616, Section 68-9911 and Section 93-307.

(4) Plaintiffs' prayer for injunctive relief is denied; however, the Court retains jurisdiction to permit the plaintiffs to apply to this Court for injunctive relief should there be a change in circumstances or should any incidents arise because of a breach of the peace out of any attempts to enforce the ordinances and statutes aforesaid.

It Is Further Ordered:

That the plaintiffs recover their costs herein.

This 19th day of February, ...

s/ Frank A. Hooper,
United States District Judge.

APPENDIX F.

UNITED STATES DISTRICT COURT
For the Southern District of Georgia,
Augusta Division.

Henry Taylor, Thomas Snowden, William Chambers, Jimmy Dukes and Silas Norman,
Plaintiffs,
versus
City of Augusta, Millard Beckum, Mayor; F. B. Green, Chief of Police, and Augusta Coach Co.,
Defendants.

Civil Action.
Number 971.

Order.

The above-entitled and numbered case having come on for trial by the Court on the 22nd day of January, 1962, and the plaintiffs having appeared by and through their attorneys, and the defendants having appeared by and through their attorneys, and the Court, after having considered the pleadings and heard the evidence, having duly made the findings of fact and conclusions of law in this case, and having previously published its opinion touching thereon, it is now

Ordered that:

(1) The following ordinances of the City of Augusta are hereby declared unconstitutional and void as being violative of the due process and equal protection clauses of the 14th Amendment to the United States Constitution;

(a) Chapter 38—Section 49—Segregation of Races on Buses for Hire—Generally.

(b) Chapter 38—Section 50—Segregation of Races on Buses for Hire—Enforcement; Police Powers of Drivers, etc.

(c) Chapter 38—Section 51—same—Refusal of Passengers to Take Assigned Seats.

(d) Chapter 1—Section 7—General Penalty; Continuing Violations.

(2) The following statutes of the State of Georgia (Georgia Code, 1933, as Revised) are hereby declared to be unconstitutional and void as being violative of the due process and equal protection clauses of the 14th Amendment to the United States Constitution:

(a) Section 68-616—Carriage White or Colored Passengers, or Both.

(b) Section 18-9904—Passenger Remaining in Car, Compartment or Seat Other Than That to Which Assigned.

(c) Section 68-9919—Motor Common Carrier Regulations, Violation Of.

(3) The following rule of the Public Service Commission of the State of Georgia is hereby declared unconstitutional and void as being violative of the due process and equal protection clauses of the 14th Amendment to the United States Constitution:

(a) Rule 48 in its entirety.

(4) The defendants, and each of them, their agents, employees and successors, and all persons in active concert and participation with them, are permanently enjoined from further enforcing or attempting to enforce any of the provisions of the foregoing designated statutes of the State of Georgia, the Rule of the Public Service Commission or the said City Ordinances of the City of Augusta. The de-

fendant, Augusta Coach Company, and its officers and employees, are permanently enjoined from further assigning passengers on its buses according to race or color, and from making any distinction based on race or color in the treatment of passengers using its buses.

It is further Ordered that the plaintiffs recover their costs herein.

This 27 day of February, 1962.

s/ Elbert P. Tuttle,
United States Circuit Judge.

(Judge Wm. A. Bootle's signature appears on the attached copy.)

.....
United States District Judge.

I hereby respectfully dissent from this Order.

s/ F. M. Scarlett,
United States District Judge.

APPENDIX G.

In the
UNITED STATES DISTRICT COURT
For the Middle District of Georgia,
Macon Division.

Rev. Cameron Alexander and Rev. Booker T. Chambers,
Plaintiffs,
v.
Bibb Transit Company, a Corporation, and L. B. McCallum, Chief of Police for the City of Macon, Georgia,
Defendants.

Civil Action.
No. 1822.

Bootle, District Judge:

This suit is brought by two Negro ministers of the gospel, patrons of the defendant Bibb Transit Company's buses, seeking a declaratory judgment invalidating certain Georgia state statutes requiring segregated seating in the City buses and praying for an injunction, preliminary and permanent, against enforcement by the defendants of further segregated seating. It is brought as a class action on behalf of the plaintiffs and all other Negro patrons of the Bus Company. Joined with Bibb Transit Company is L. B. McCallum, Chief of Police for the City of Macon.

The complaint, in substantially its present form, was presented to the court on the late afternoon of February 16, 1962 supported by affidavits with request for the immediate issuance of a temporary restraining order. Having learned that Bibb Transit Company desired to be heard, and being of the opinion that the defendants were entitled to a hearing upon the allegations made against them, the court

refused to issue a temporary restraining order and set the case to be heard on February 28, 1962, on the prayer for a preliminary injunction. In as much as the case involves the enforcement, operation and execution of state statutes, the Clerk of this Court gave timely notice to the Governor and Attorney General of Georgia, as contemplated by Title 28, Section 2284 of the United States Code.

This cause came on regularly to be heard on February 28, 1962, in accordance with said setting and in accordance with order to show cause signed by this court on February 19, 1962, upon plaintiffs' application for preliminary injunction. At said hearing all parties were represented by counsel and counsel for Bibb Transit Company then filed a motion to dismiss, a motion praying the impaneling of a three-judge court to determine the issues presented by the complaint, and also the issues presented by Bibb Transit Company's cross-action and cross-complaint, and filed also a comprehensive response, cross-complaint and cross-claim, as well as a response to plaintiffs' motion for preliminary injunction. At said hearing it was agreed by counsel for all parties that the said hearing would constitute the full and final hearing upon the merits of the case and not solely a hearing for a preliminary injunction, and that the case would be decided and determined without any oral testimony and upon the basis of the verified pleadings and all affidavits previously filed on behalf of the plaintiffs and the affidavit of L. D. Baggs, Jr., then filed on behalf of the defendants, and upon such stipulations as were entered into at said hearing. No pleadings were filed on behalf of L. B. McCallum, Chief of Police, but his counsel concurred in the agreements and stipulations above recited. Bibb Transit Company's motion to dismiss is upon the ground that the complaint shows no obligation under the law or by contract for it to transport plaintiffs or persons of the class represented by plaintiffs, and that, therefore, it is authorized to deny transportation to all such persons, or to

prescribe and enforce any rule or regulation it desires as to how or where such persons are to be transported, under what conditions they are to be transported, and where they are to be seated if transported. Said motion is hereby overruled, as a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See *Conley v. Gibson*, 355 U. S. 41, 45-46. Moreover, at said hearing it was disclosed that Bibb Transit Company is a common carrier of passengers holding a certificate of public convenience and necessity from the Georgia Public Service Commission and that it also holds a license and franchise from the City of Macon to transport passengers. Thus, it is bound to receive all passengers offered that it is able and accustomed to carrying. Ga. Code Ann., § 18 202.

Bibb Transit Company's response denies the allegations as contained in the complaint with respect to its enforcement of segregated seating, and sets up, in substance, that its practice and policy is as follows: In the event a Negro passenger sits in a seat in front of a white seated passenger and there is a vacant seat or seats behind the white passengers the bus operator stops the bus and courteously requests the Negro passenger to move back to a vacant seat designated by the operator; that if the Negro passenger fails to comply with said request the operator says no more but goes to the nearest telephone and reports the incident to the supervisor, and then the operator returns to the bus and awaits the arrival of the supervisor; if the Negro passenger wants to get off the bus he is permitted to do so and if he wants his fare back his fare is returned to him; that "if the supervisor reports the incident to the City police, or the County police, if the incident occurs outside the corporate limits of the City of Macon, and the police come to the scene, the bus operator in the presence of the police, repeats his request", and that this is all the

bus operator does. This response is verified by the President of the Bibb Transit Company, and his affidavit also presented at the trial is to the effect that the allegations of the response are true and correct.

The cross-action and cross-complaint sets up that there can possibly be only one clause in Code Section 18-207 that can be held void and unenforceable as being in contravention of the due process and equal protection clauses of the Fourteenth Amendment, namely, the clause "so as to separate the white and colored races as much as practicable", and that if this court determines that such clause is invalid its decree should be so limited; that the other two Code Sections attacked by the complaint, §§ 18-208 and 18-9904, make no mention of this language; that there are numerous instances wherein the bus operator should have the authority to assign seats to passengers regardless of race; ten such instances being suggested as follows:

"(i) Where two passengers contend they are entitled to the same seat.

"(ii) When a passenger's clothing or person is so unclean that he should be assigned to a special seat.

"(iii) Where a passenger is obviously sick.

"(iv) Where a passenger is loud or boisterous.

"(v) Where a passenger is or appears to be intoxicated.

"(vi) Where a passenger has some physical infirmity that requires some special seating arrangement.

"(vii) Where two or more passengers get into an argument and the separation of them is for the best interest of all.

"(viii) Where an obese passenger cannot sit in a single seat, next to another passenger, without partially sitting on the other passenger.

"(ix) Where a passenger takes one seat in preference to others available obviously for the purpose of being obnoxious.

"(x) Where a passenger violates a company rule, such as talking to the driver or smoking, or has his feet out in the aisle, or similar instances",

and prays that if this court determines the quoted clause of § 18-207 to be invalid it make a determination also concerning the validity of the same type clause as found in §§ 68-616, 68-9911 and in Rule 48 of the Georgia Public Service Commission. Counsel for the plaintiffs agreed that in view of the disclosure that Bibb Transit Company is or claims to be a common carrier of passengers holding a certificate of public convenience and necessity from the Georgia Public Service Commission it would be proper for this court to comply with Bibb Transit Company's request to construe the last two cited Code Sections, and said Rule 48.

The court now makes the following findings of fact and conclusions of law.

Findings of Fact.

1. The plaintiffs are Negro citizens of the United States, residents of the City of Macon, and patrons of the defendant Bibb Transit Company.

2. A substantial number of the patrons of Bibb Transit Company are Negro residents of the City of Macon and have an identity of interest with these plaintiffs and are too numerous to be included in this suit.

3. It is the custom of the defendant Bibb Transit Company, which it is required to enforce under sanction of the state statutes hereinafter set forth, to require on its buses separate seating of the white and Negro races.

4. The operators of the buses stop the buses and call upon police officers to enforce this pattern of segregated seating when it is not voluntarily complied with by Negro passengers.

5. On February 15, 1962, the two plaintiffs, in the City of Macon, boarded the Vineville bus, owned and operated by the defendant Bibb Transit Company, paid their fares, and took their seats near the front of the bus. Upon noticing the seat location of the plaintiffs, the operator of the bus, acting within the scope of his employment by Bibb Transit Company, directed that the plaintiffs move to the rear or be arrested. Not desiring to be arrested, nor to be discriminated against in the use of the bus, the plaintiffs, on account of the threat of arrest, dismounted at the next stop.

6. On February 9, 1962, four other Negro ministers of the gospel in the City of Macon were arrested by policemen of the City of Macon acting under color of state law and under the custom practice and usage of Bibb Transit Company and the police officers of the City of Macon to enforce on Bibb Transit Company's buses separate seating of members of the white and Negro races. Said four persons were charged in the City Court of Macon with violations of Ga. Code Ann., § 18-208.

7. There are accusations pending in the City Court of Macon also against eleven or more other Negroes charging violations of said Code Section 18-208, all in connection with buses owned and operated by the defendant Bibb Transit Company.

8. None of the Negro passengers above referred to, including plaintiffs, the four other Negro ministers and the eleven or more Negroes referred to in the immediately preceding paragraph, engaged in any noisy, rowdy, or boisterous conduct in connection with their arrests or prosecutions.

9. At the time of all these occurrences and continuing to the present, the following statutes of the State of Georgia stand unrepealed and, on their face, are in full force and effect.

"18-207. (2718; 535 P. C.). Duty to assign passengers to their cars; police powers of conductors.—All conductors or other employees in charge of passenger cars shall assign all passengers to their respective cars, or compartments of cars, provided by the said companies under the provisions of section 18-206 and all conductors of street cars and busses shall assign all passengers to seats on the cars under their charge, so as to separate the white and colored races as much as practicable; and all conductors and other employees of railroads and all conductors of street cars and busses shall have, and are hereby invested with, police powers to carry out said provisions. (Acts 1890-1, p. 157.)

"18-208. (2719; 536 P. C.). Remaining in seat, compartment or car other than that to which assigned.—No passenger shall remain in any car, compartment, or seat, other than that to which he has been assigned. The conductor and any and all employees on such cars are clothed with power to eject from the train or car any passenger who refuses to remain in the car, compartment or seat assigned to him. (Acts 1890-1, p. 157.)

"18-9904. (2719). Passenger remaining in car, compartment or seat other than that to which assigned.—Any passenger violating the provision of section 18-208, prohibiting any passenger from remaining in any car, compartment, or seat other than that to which he has been assigned, shall be guilty of a misdemeanor. (Acts 1899-1, p. 157.)"

10. Also at the time of all these occurrences and continuing to the present the following statutes of the State of Georgia, and the following Rule promulgated by the Georgia Public Service Commission stand unrepealed and, on their face, are in full force and effect.

"68-616. Carriage of white or colored passengers or both.—Motor common carriers may confine themselves to carrying either white or colored passengers; or they may provide different motor vehicles for carrying white and colored passengers; and they may carry white and colored passengers in the same vehicle, but only under such conditions of separation of the races as the Commission may prescribe. (Acts 1931, pp. 199, 204.)

And

"Rule 48.

"Motor carriers may confine themselves to carrying either white or colored passengers or they may provide different motor vehicles for carrying white and colored passengers; and they may carry white and colored passengers in the same vehicle, under such conditions as will provide a separation of the races in the most practicable manner.

And

"68-9911. Motor common carrier regulations, violation of.—Every officer, agent, or employee of any corporation and every person who violates or fails to comply with the provisions of Chapter 68-6 relating to the regulation of motor carriers, or any order, rule, or regulation of the Public Service Commission or who procures, aids or abets therein, shall be guilty of a misdemeanor. (Acts 1931, pp. 199, 208.)",

the latter being the statutes and rule as to which the Bibb Transit Company seeks a declaration.

11. The plaintiffs are entitled to a declaratory judgment that the following language contained in Code Section 18-207, to-wit: "so as to separate the white and colored races as much as practicable" is unconstitutional and void, and that the entire Code Section is unconstitutional and void insofar as it is ever construed, interpreted, applied or enforced for the purpose of giving effect to the said quoted clause, and that Code Sections 18-208 and 18-9904 are clearly unconstitutional and void insofar as they, or either of them is ever construed, interpreted, applied or enforced for the purpose of giving effect to the said quoted clause of Code Section 18-207, and plaintiffs are entitled to a permanent injunction as prayed, they having, at the trial, waived their prayer for injunction against members of the Police Department against inconveniencing, harrassing and intimidating some Negroes as they drive their automobiles upon the streets of Macon during the Negroes' boycott of the buses of Bibb Transit Company. And plaintiffs and Bibb Transit Company are entitled to a declaratory judgment that Code Section 68-616 is unconstitutional and void in its entirety; that Rule 48 of the Georgia Public Service Commission is unconstitutional and void in its entirety, and that Code Section 68-9911 is unconstitutional and void insofar as it is ever construed, interpreted, applied or enforced for the purpose of giving effect to Code Section 68-616, or to Rule 48, or to any similar statute, or to any similar order, rule, or regulation of the Georgia Public Service Commission, or for the purpose of enforcing in anywise any policy, custom, practice, or usage of enforced segregation of members of different races because of their race or color. This case does not require decision of the question whether Code Section 18-207 has any efficacy remaining or whether this ruling and similar prior rulings of other courts herein cited completely eviscerate it.

Conclusions of Law.

1. The said Code Sections and Rule 48 are clearly unconstitutional and void as, and to the extent, above recited. This was clear even before the Supreme Court spoke again on Monday of this week, February 26, 1962. This issue was conclusively determined five years ago when the Supreme Court, on November 13, 1956, in a unanimous Per Curiam action on motion affirmed the *Montgomery Bus case*, and again on December 17, 1956, by unanimous action denied a petition for clarification and rehearing in the same cause. That case, in the lower court, was styled *Browder v. Gayle*, 142 F. Supp. 707 (M. D. Ala., June 5, 1956). It was decided by a three-judge court inasmuch as at that time a substantial constitutional question was involved. The majority opinion was written by Judge Rives of the United States Court of Appeals, and in the opinion he said:

> "The ultimate question is whether the statutes and ordinances (of Alabama and Montgomery) requiring the segregation of the white and colored races on the common carrier motor buses in the City of Montgomery and its police jurisdiction are unconstitutional and invalid" and it answered that question as follows: "In fact, we think that *Plessy v. Ferguson* has been impliedly, though not explicitly, overruled, and that, under the later decisions, there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation within the City of Montgomery and its police jurisdiction. The application of that doctrine cannot be justified as a proper execution of the state police power." [Par.] "We hold that the statutes and ordinances requiring segregation of the white and colored races on the motor buses of a common carrier of passengers in the City of Montgomery and its police jurisdiction violate the due process and equal

protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States."

Thus, before the year 1956 had ended the decision of that three-judge court had twice received the full and unanimous approval of the Supreme Court.

And then on February 26, 1962, in the case of *Bailey v. Patterson*, ... U. S. ...., as if to make assurance doubly sure, the Supreme Court said:

> "We have settled beyond question that no state may require racial segregation of interstate or intrastate transportation facilities. *Morgan v. Virginia*, 328 U. S. 373; *Gayle v. Browder*, 352 U. S. 903; *Boynton v. Virginia*, 364 U. S. 454. The question is no longer open; it is foreclosed as a litigable issue."

2. In view of the holding and history of *Browder v. Gayle, supra*, there is no longer any serious constitutional question with respect to the validity of these statutes and order, and therefore it is not necessary to convene a three-judge court in this case. It has been many times decided that where no serious constitutional question, not previously decided by the Supreme Court, is presented a three-judge court is not required. See *Ex Parte Poresky*, 290 U. S. 30, 78 L. Ed. 152 (1933); *Bush v. Orleans Parish School Board*, 138 F. Supp. 336, 337 (E. D. La. 1956, three-judge court); *Board of Supervisors of La. St. U. & A. M. Col. v. Ludley*, 252 F. 2d 372 (5th Cir. 1958); *Hoxsey Cancer Clinic v. Folsom*, 155 F. Supp. 376 (D. C. Dist. of Columbia, 1957); *Holmes v. Danner*, 191 F. Supp. 394, 415 (12) (M. D. Ga. 1961).

The three identical statutes, 18-207, 18-208 and 18-9904, were tested constitutionally in the District Court for the Northern District of Georgia on January 21, 1959, in the case of *Williams v. Georgia Public Service Commission*, Race Relations Law Reporter, Vol. 14, No. 1, page 166, and there the court said:

> "It is mandatory upon this Court to declare the aforesaid . . . statutes to be unconstitutional and void by reason of a decision by a three-judge court in the case of *Browder et al. v. W. A. Gayle et al.*, 142 F. Supp. 707, affirmed by unanimous vote of the United States Supreme Court, 352 U. S. 903. . . . This court is in effect being requested to declare that the law as pronounced by the United States Supreme Court is the law, and this Court does so."

And there the court acted without convening a three-judge court. So also, did the District Court for the Southern District of Florida with respect to similar state statutes on January 1, 1957 in the case of *Garmon v. Miami Transit Company*, 151 F. Supp. 953. The very recent case of *Bailey v. Patterson, supra*, also definitely disposes of this issue.

Accordingly, the motion of Bibb Transit Company to impanel a three-judge court is hereby overruled.

3. The issuance of a permanent injunction is necessary to prevent immediate and irreparable damage because the plaintiffs, and the class represented by them are being denied their constitutional right to equality of treatment with members of the white race in the matter of public transportation conducted by Bibb Transit Company under a license and franchise from the City of Macon and this denial of constitutional right to equal treatment is under the sanction of state statutes requiring it, and under such circumstances every day that passes counts as an irremediable loss to the persons thus discriminated against. See *Orleans Parish v. Bush*, 242 F. 2d 156, 162 (5th Cir. 1957). See also *Taylor v. City of Augusta*, Civil Action No. 971, Southern District of Georgia, February 9, 1962.

4. This suit is properly maintainable as a class action, the class being composed of Negroes who are citizens of the United States and are, or desire to become, fare-pay-

ing passengers of Bibb Transit Company. *Holmes v. Danner*, 191 F. Supp. 394, 409 (7) (M. D. Ga. 1961).

5. In Bibb Transit Company's cross-action and cross-complaint it alleges that in the event this court declares that said company can not legally enforce separation of its patrons who are transported on the same bus according to race it contemplates the use of separate buses for white patrons and Negro patrons and prays for a declaration and decree that it would not be in violation of the Fourteenth Amendment or of any other provision of the Constitution of the United States or of any law of the United States for it to transport white patrons in buses separate from those in which it transports its colored patrons so that no white person would be permitted on a bus designated for colored patrons and no colored person would be permitted on a bus designated for white patrons. Obviously, Bibb Transit Company can not do what it contemplates. Legally impermissible segregation can not be cured by replacing it with an even more pronounced segregation. The illegality in the former would persist in the latter.

6. While the Fourteenth Amendment would not prohibit state action requiring the assignment of passengers to seats so long as neither the due process nor equal protection clause thereof is violated it must, of course, be remembered that the State can require no such assignment for the purpose, evident or obscure, of enforcing separate seating because of race or color. *Bailey v. Patterson, supra.* As the Supreme Court said in *Lane v. Wilson*, 307 U. S. 268, 275, 83 L. Ed. 1281, 1287, back in 1939, the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination."

Decree.

Whereupon, it is Ordered and Decreed that:

1. The following language contained in Code Section 18-207, to-wit: "so as to separate the white and colored races as much as practicable" is unconstitutional and void as being violative of the due process and equal protection clauses of the Fourteenth Amendment, and the entire Code Section is unconstitutional and void insofar as it is, or is ever sought to be, construed, interpreted, applied or enforced for the purpose of giving effect to said quoted clause.

2. Code Sections 18-208 and 18-9904 are clearly unconstitutional and void as being violative of the due process and equal protection clauses of the Fourteenth Amendment insofar as they, or either of them is, or is ever sought to be, construed, interpreted, applied or enforced for the purpose of giving effect to said quoted clause of Code Section 18-207.

3. Code Section 68-616 is unconstitutional and void in its entirety as being violative of the due process and equal protection clauses of the Fourteenth Amendment.

4. Rule 48, above quoted, of the Georgia Public Service Commission is unconstitutional and void in its entirety as being violative of the due process and equal protection clauses of the Fourteenth Amendment.

5. Code Section 68-9911 is unconstitutional and void as being violative of the due process and equal protection clauses of the Fourteenth Amendment insofar as it is, or is ever sought to be, construed, interpreted, applied or enforced for the purpose of giving effect to Code Section 68-616 or to said Rule 48, or to any similar statute, or to any similar order, rule or regulation of the Georgia Public Service Commission.

6. All of said Code Sections not herein ruled to be unconstitutional and void in their entirety are unconstitu-

tional and void as being violative of the due process and equal protection clauses of the Fourteenth Amendment insofar and to the extent that they or any one of them is, or is ever sought to be construed, interpreted, applied or enforced for the purpose of enforcing in anywise any policy, custom, practice or usage of enforced segregation of members of different races because of their race or color.

7. The defendants, and each of them, their agents, employees, and successors, and all persons in active concert or participation with them are permanently enjoined from further enforcing or attempting to enforce that portion of Code Section 18-207 which reads "so as to separate the white and colored races as much as practicable," or any of the provisions of Code Sections 18-208 or 18-9904 for the purpose of giving effect to the above quoted language from Code Section 18-207, and from further enforcing or attempting to enforce any of the provisions of Code Section 68-616, or any of the provisions of Rule 48 of the Georgia Public Service Commission, or any of the provisions of Code Section 68-9911 insofar as the same relate to Code Section 68-616, or to said Rule 48, or to any statute similar to Code Section 68-616, or any order, rule or regulation of the Georgia Public Service Commission similar to said Rule 48. The defendant Bibb Transit Company and its officers, agents, employees and successors and all persons in active concert or participation with them are permanently enjoined from further assigning passengers on its buses according to race or color, and from making any distinction based on race or color in the treatment of passengers using its buses.

It is further Ordered that the plaintiffs recover their costs herein.

This 1st day of March, 1962.

/s/ W. A. Bootle,
United States District Judge.